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88-NO.1244

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

LAMAR OUTDOOR ADVERTISING, INC. ET AL.,

Petitioners

v.

MISSISSIPPI STATE TAX COMMISSION, ET AL.,

Respondents

---

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

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QUESTIONS PRESENTED

1. Whether the Twenty-First Amendment's enhancement of the police power granted to states in the area of liquor regulation alters the standard of review or shifts the burden of proof otherwise applicable in determining whether a state's general ban on the advertising of liquor violates the First Amendment protection of commercial speech?

2. In the face of uncontradicted record evidence that residents of a state are inundated with liquor advertisements from magazines, newspapers and broadcasts originating from sources outside the state, can such state impose a ban on liquor advertisements in newspapers, magazines, broadcasts, and other public advertising media which originate within the state consistent with the protection of commercial speech and equal protection under the First and Fourteenth Amendments?

PARTIES TO THE PROCEEDING BELOW

The following were parties to the proceeding (No. 82-4076) in the United States Court of Appeals for the Fifth Circuit:

Plaintiffs-Appellees:

Lamar Outdoor Advertising, Inc.  
Outdoor Communications, Inc.  
Crawford Advertising of Mississippi, Inc.  
Cameron, Inc.  
National Advertising Company  
Classic Advertising, Inc.  
Walter C. Vick d/b/a Mississippi Outdoor Advertising  
Mississippi Press Register, Inc.  
Natchez Newspapers, Inc.  
Gulf Publishing Company, Inc.  
Delta Press Publishing Company, Inc.  
Grenada Newspapers, Inc.  
Commonwealth Publishing Company, Inc.  
Delta-Democrat Publishing Company  
Bolivar Newspapers, Inc.  
Capital Reporter Publishing Company,  
Incorporated  
Crest Broadcasting Company, Incorporated  
Service Broadcasters, Incorporated  
Lee Broadcasting Company  
Tri-Cities Broadcasting Company  
E.O. Roden and Associates  
WLOX Broadcasting Company  
T A B Broadcasting Company  
Rebel Broadcasting Company  
New South Communications, Incorporated  
New South Broadcasting Corporation  
Fritts Broadcasting, Incorporated  
Deep South Radio, Incorporated  
New Laurel Radio Station, Incorporated  
Television America Sixteen, Incorporated

Bob McRaney Enterprises, Incorporated  
Gateway Broadcasting, Incorporated  
First Natchez Corporation  
Air Enterprises, Incorporated  
Southeast Mississippi Broadcasting Company  
Southland, Incorporated  
Voice of the New South, Incorporated  
P.T.C., Incorporated  
WGUF, Incorporated  
Haddox Enterprises, Incorporated  
Broadcasters and Publishers, Incorporated  
WGUD Stereo, Incorporated  
Central Television, Incorporated  
Communications Improvements, Incorporated  
Gulf Coast Broadcasting Company  
Radio Hattiesburg, Incorporated  
Charisma Broadcasting Company  
Broadcast Associates, Incorporated  
Southern Electronics Company, Incorporated  
Tung Broadcasting Company  
Town and Country Broadcasting Company,  
Incorporated  
Martin Broadcasting Company  
Starkville Broadcasting Company  
WJDX, Incorporated  
Metro Radio, Incorporated  
WTWV, Incorporated

Defendants-Appellants:

Mississippi State Tax Commission,  
Alcoholic Beverage Control Division  
A.C. Lambert, Jr.  
Robert A. Baggett  
Latrell Ashley  
Individually and in their capacities as  
Commissioners of the Mississippi State  
Tax Commission  
Bill Allain  
Individually and in his capacity as  
Attorney General of the State of  
Mississippi

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
PARTIES TO THE PROCEEDING BELOW ...	ii
TABLE OF AUTHORITES .....	vi
OPINIONS BELOW .....	2
JURISDICTION .....	3
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	3
REASONS FOR GRANTING THE WRIT .....	10
I. THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN CONFLICT WITH DECISIONS OF THIS COURT BY FINDING THAT THE TWENTY-FIRST AMENDMENT OPERATES SO AS TO ALTER THE STANDARD OF REVIEW AND SHIFT THE BURDEN OF PROOF WHICH WOULD OTHER- WISE APPLY TO COMMERCIAL SPEECH RESTRICTIONS .....	10

II. THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW CONCERNING THE STANDING OF MEDIA BUSINESS TO CHALLENGE RESTRICTIONS ON COMMERCIAL SPEECH ON EQUAL PROTECTION GROUNDS IN CONFLICT WITH THE REASONING OF OPINIONS OF THIS COURT AND IN SUCH A MANNER THAT THIS COURT'S GUIDANCE IS NEEDED TO CLARIFY AND PROTECT THE INTERESTS OF SPEAKERS OR ADVERTISERS IN THE FREE FLOW OF COMMERCIAL INFORMATION .....	17
CONCLUSION .....	22

## TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
Bates v. State Bar of Arizona, 433 U.S. 350 (1977) .....	21
Bigelow v. Virginia, 421 U.S. 809 (1975) .....	16
Bolger v. Youngs Drugs Products Corp., 103 S.Ct. 2875 (1983) .....	8, 11 14, 15
California v. LaRue, 409 U.S. 109 (1972) .....	7, 11, 12
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) .....	12
Capital Cities Cable, Inc. v. Crisp, 104 S.Ct. 66 (1983) .....	7, 13
Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980) .....	passim
Craig v. Boren, 429 U.S. 190 (1976) .....	12
Department of Revenue v. James B. Bean Dis- tilling Company, 377 U.S. 341 (1964) .....	12
Dunagin v. City of Oxford, 489 F. Supp. 763 (N.D. Miss. 1980), <u>affd</u> , 718 F.2d 738 (5th Cir. 1983).....	2, 6
Friedman v. Rogers, 440 U.S. 1 (1979) .....	17, 21
Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) .....	12
Memphis Publishing Co. v. Leech, 539 F. Supp. 405 (W.D. Tenn. 1982) .....	21
Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) .....	21

## TABLE OF AUTHORITIES--Continued

	Page
NAACP v. Buttons, 371 U.S. 415 (1963) .....	19
New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) .....	7-8, 11, 12
Oklahoma Telecasters Ass'n. v. Crisp, 699 F.2d 409 (10th Cir.), cert. granted sub. nom, Capital Cities Cable, Inc. v. Crisp, 104 S.Ct. 66 (1983).....	7, 13, 14
Police Department of Chicago v. Mosely, 408 U.S. 92 (1972) .....	19
Queensgate Investment Co. v. Liquor Control Com- mission, 69 Ohio St.2d 361, 433 N.E.2d 138, appeal dismissed U.S. ___, 103 S.Ct. 31 (1982) .....	8
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) .....	20
Stanley v. Georgia, 394 U.S. 557 (1969) .....	19
Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) .....	21
Williams v. Rhodes, 393 U.S. 23 (1968) .....	19
Wisconsin v. Constantineau, 400 U.S. 433 (1971) .....	12

CONSTITUTIONAL PROVISIONS:

Constitution of the United States of America First Amendment .....	passim
--	--------

## TABLE OF AUTHORITIES--Continued

	Page
Fourteenth Amendment .....	passim
Twenty-first Amendment .....	passim
 <u>STATUTORY PROVISIONS:</u>	
Miss. Code Ann. § 67-1-3 (1972) ..	3
Miss. Code Ann. § 67-1-7 (1972) ..	3
Miss. Code Ann. § 67-1-19 (1972) ..	3
Miss. Code Ann. § 67-1-37(e)(1972)	3
Miss. Code Ann. § 67-1-85 (1972) ..	3
Miss. Code Ann. § 67-1-87 (1972) ..	3
Miss. Code Ann. § 97-31-1 (1972) ..	3
28 U.S.C. § 1254(1) .....	3
28 U.S.C. § 1331 .....	5
28 U.S.C. § 1343 .....	5
28 U.S.C. § 2201 .....	5
28 U.S.C. § 2202 .....	5
42 U.S.C. § 1983 .....	5
 <u>REGULATIONS:</u>	
Alcoholic Beverage Control Regulation No. 1 .....	3
Alcoholic Beverage Control Regulation No. 6 .....	3
Alcoholic Beverage Control Regulation No. 36 .....	3

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

Petitioners respectfully petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review that court's judgment of October 31, 1983, in Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission, No. \_\_\_\_\_

82-4076, which was decided together with  
Dunagin v. City of Oxford, No. 80-3762, in  
a single opinion.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, on rehearing en banc, which upheld the ban on liquor advertising is reported at 718 F.2d 738 and appears as Appendix A to this petition. The panel opinion of the United States Court of Appeals for the Fifth Circuit which held that the ban on liquor advertising was unconstitutional is reported at 701 F.2d 314 and appears as Appendix B to this petition. The opinion of the United States District Court for the Southern District of Mississippi which found the ban on advertising unconstitutional is reported at 539 F.Supp. 817 and is attached as Appendix D to this petition.

JURISDICTION

The judgment of the Court of Appeals, on rehearing en banc, was entered on October 31, 1983 and is attached as Appendix E. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS, STATUTES,  
AND REGULATIONS INVOLVED

This case involves the First, Fourteenth, and Twenty-first Amendments to the Constitution of the United States; Miss. Code Ann. §§ 67-1-3,-7,-19,-37(e),-85 and -87 (1972); Miss. Code Ann. § 97-31-1 (1972); Regulations No. 1, 6 and 36 of the Alcoholic Beverage Control Division of the Mississippi State Tax Commission. These provisions are set forth in Appendix F to this petition.

STATEMENT OF THE CASE

The 56 petitioners, who consist of outdoor advertisers and print and elec-

tronic media, filed this action in the United States District Court for the Southern District of Mississippi, Jackson Division, on November 1, 1978. This action was filed in order to challenge certain statutes and regulations which prohibit advertisements of alcoholic beverages in Mississippi which originate within the state on the basis that such statutes and regulations constitute an abridgement of commercial free speech and a denial of equal protection under the law in violation of the First and Fourteenth Amendments. The Mississippi laws and regulations are necessarily material to a consideration of the questions presented by this petition. However, in order to avoid duplication, the thorough descriptions of the relevant Mississippi laws which are set forth on pages 3a through 11a of Appendix A (the *en banc* opinion) and at pages 77a through 89a of Appendix B to this petition (the panel opinion) are

incorporated by reference in this statement of the case. Petitioners sought a declaratory judgment that the challenged statutes and regulations were unconstitutional and a prohibitory injunction enjoining the respondents from attempting to enforce them.

Federal jurisdiction was invoked under 28 U.S.C. §§ 2201, 2202, 1331 and 1343 and 42 U.S.C. § 1983.

In 1979 both petitioners and respondents moved for summary judgment. Both motions were denied. The case was then tried before the district court, sitting without a jury, on March 11-12, 1981. The opinion of the district court, which appears as Appendix D to this petition, sets forth the district court's findings that Mississippi's ban on liquor advertising within the state violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, since the ban "in no way rationally furthers the state's

interest" in promoting temperance. 539

F.Supp. 830-31, App. C at 221a.

The respondents appealed to the United States Court of Appeals for the Fifth Circuit. On appeal, the case was consolidated with the case of Dunagin v. City of Oxford.<sup>1</sup> A panel of the court heard the consolidated appeal and decided that the challenged laws and regulations were an unconstitutional restrictions of commercial speech but did not resolve the issue of whether the restriction also violated the Equal Protection Clause.<sup>2</sup>

Before delivery of the panel opinion, the Tenth Circuit issued a conflicting

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<sup>1</sup>489 F. Supp. 763 (N.D. Miss. 1980) (District Court upheld advertising restrictions on motion for summary judgment, but no equal protection claims were involved).

<sup>2</sup>701 F.2d at 334 n. 29, App. B at 158a, n. 29.

opinion<sup>3</sup> upholding an Oklahoma law which was similar to the Mississippi law challenged in this case. Pursuant to the rules of the Fifth Circuit governing the issuance of opinions in conflict with a decision of another circuit, a rehearing en banc was ordered, and the panel opinion was vacated.<sup>4</sup>

The en banc court concluded that the Mississippi regulatory scheme violated neither the First Amendment nor the Equal Protection Clause of the Fourteenth Amendment and reversed the judgment of the district court. In ruling on the First Amendment claims, the court of appeals interpreted California v. LaRue, 409 U.S. 109 (1972), New York State Liquor Authority v.

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<sup>3</sup>Oklahoma Telecasters Ass'n. v. Crisp, 699 F.2d 490 (10th Cir.), cert. granted sub. nom. Capital Cities Cable, Inc. v. Crisp, 104 S.Ct. 66 (1983).

<sup>4</sup>718 F.2d at 315 n. 2, App. A at 3a n.2.

Bellanca, 452 U.S. 714 (1981), and Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St.2d 361, 433 N.E.2d 138, appeal dismissed \_\_\_\_ U.S. \_\_\_, 103 S.Ct. 31 (1982) as requiring an "added presumption in favor of validity" for the state's prohibition on liquor advertisements despite the trial court's determination that the advertising ban "does no good" and did not further the state's interest in temperance. 718 F.2d at 750, App. A at 47-48a. Rather than applying the commercial speech standard of review as set forth in Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980) and requiring the state to bear the burden of proof in accordance with such standard as is mandated by Bolger v. Youngs Drug Products Corp., 103 S.Ct. 2875, 2882 n. 20 (1983), the Fifth Circuit found that the Twenty-first Amendment requires the application of a rational basis scrutiny of the Mis-

sissippi advertising ban and required the burden of proving that the ban was not a reasonable and properly restricted means of achieving Mississippi's goal of temperance to be shifted to petitioners. See 718 F.2d at 745, App. A at 26-27a.

In ruling on petitioners' equal protection claim, the en banc court of appeals ruled that since "the commercial speech doctrine is concerned primarily with the level and quality of information reaching the listener," rather than the advertiser, "there is no classification upon which the [petitioners] can assert a meaningful equal protection claim." 718 F.2d at 752, App. A at 57-58a.

REASON FOR GRANTING THE WRIT

## I.

THE COURT BELOW HAS DECIDED  
AN IMPORTANT QUESTION OF  
FEDERAL CONSTITUTIONAL LAW  
IN CONFLICT WITH DECISIONS  
OF THIS COURT BY FINDING  
THAT THE TWENTY-FIRST  
AMENDMENT OPERATES SO AS  
TO ALTER THE STANDARD OF  
REVIEW AND SHIFT THE BURDEN  
OF PROOF WHICH WOULD OTHER-  
WISE APPLY TO COMMERCIAL  
SPEECH RESTRICTIONS

This case presents important issues concerning the effect of the Twenty-first Amendment on the allowable scope and customary standard of review of restrictions on commercial speech. If the proper standard of review for restrictions on truthful advertising of legally available products<sup>1</sup> had merely been misapplied, then the

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<sup>1</sup>Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566-67 (1980) (regulation must directly advance a substantial governmental interest and must not be more extensive than necessary to serve that interest).

error committed by the Fifth Circuit in upholding, as constitutional, Mississippi's ban on liquor advertisements might not merit this Court's attention. However, the manner in which the Fifth Circuit has interpreted LaRue and Bellanca as authority from this Court that the Twenty-first Amendment alters the standard of review and shifts the burden of proof which would otherwise be appropriate if the advertising restrictions did not involve advertisements of liquor<sup>6</sup> will have far reaching and harmful effects in eroding the constitutional protection of the free flow of commercial information, if not corrected by this Court.

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<sup>6</sup>718 F.2d 745, App. A at 26-27a. (Court of appeals distinguishes Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980) and Bolger v. Youngs Drug Products Corp., 103 S.Ct. 2875 (1983) from New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) and California v. LaRue, 409 U.S. 109 (1972).

Although the court of appeals noted the persuasive line of cases' in which this Court has repeatedly refused to dilute its otherwise appropriate standard of review for laws restricting individual rights whenever liquor may be involved, no attempt was made to reconcile this line of cases with the conflicting opinion of the en banc court or to distinguish this line of cases from LaRue and Bellanca. By contrast, the earlier panel opinion of the Fifth Circuit, which found the Mississippi advertising ban to be unconstitutional, distinguishes the restrictions upheld in LaRue and Bellanca as limited time, place and manner restrictions "directed at the

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'718 F.2d at 744, App. A at 21-11a, citing, Larkin v. Grendel's Den, Inc., 459 U.S. 116, (1982), California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), Craig v. Boren, 429 U.S. 190 (1976), Wisconsin v. Constantineau, 400 U.S. 433 (1971), and Department of Revenue v. James B. Bean Distilling Company, 377 U.S. 341 (1964).

dispensation of liquor" which only incidentally burden expression from those restrictions which are incidentally related to liquor regulation while in direct conflict with constitutional guarantees, such as the Mississippi regulations which "are directly aimed at . . . [and] impose a virtually absolute ban upon [petitioner's] expression." 701 F.2d 327-30. App. B at 124-127a.

Some of the harmful consequences of the Fifth Circuit's opinion may be addressed by this Court in deciding Capital Cities Cable, Inc. v. Crisp<sup>\*</sup>. However, even though both the Tenth Circuit in deciding Crisp <sup>1</sup> and the Fifth Circuit in

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<sup>\*</sup>No. 82-1795. cert. granted, 103 S.Ct. 66 (1983) (oral argument set for February 21, 1984).

<sup>\*</sup>Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir.), cert. granted sub nom, Capital Cities Cable, Inc. v. Crisp, 104 S.Ct. 66 (1983).

this case departed from the Central Hudson standard of review by applying a rational basis standard of review, the Fifth Circuit opinion has gone much further than the Tenth Circuit opinion by shifting the burden of proof to the petitioners in conflict with Bolger v. Youngs Drug Products Corp.<sup>10</sup> Further, unlike the situation in Crisp, where the Tenth Circuit was reviewing the lower court's ruling on a motion for summary judgment,<sup>11</sup> the Fifth Circuit in this case refused to accept the findings reached by the district court after two days of trial in which the trial judge heard testimony from experts on the issue of whether the ban on advertisements advanced the state's interest in temperance.<sup>12</sup> Despite

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<sup>10</sup>103 S.Ct. 2875, 2882 n. 20 (1983).

<sup>11</sup>699 F.2d at 493 (10th Cir. 1983).

<sup>12</sup>718 F.2d at 748 n. 8, App. A at 39a, n. 8 (the en banc opinion states that (Footnote continued)

the trial court's finding of fact that "residents of Mississippi are literally inundated with liquor advertisements from sources originating outside the state,"<sup>13</sup> the Fifth Circuit ignored the reasoning of this Court in Bolger<sup>14</sup> and found that if the consumers in Mississippi were indeed receiving liquor advertisements from

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(Footnote continued)

the district court was in error in reaching a judicial determination of the issue of direct advancement on the basis that this is primarily a legislative determination which if "not binding . . . at least . . . carries great weight.").

<sup>13</sup>539 F.Supp. at 830. App. D at 219a.

<sup>14</sup>In determining that the prohibition on mailing unsolicited advertisements for contraceptives did not directly advance the government's interest in aiding parents' efforts to inform their children of birth control methods, this Court explained that such a law could provide "only the most limited incremental support for the interest asserted" where "parents must already cope with the multitude of external stimuli that color their children's perception of sensitive subjects." 103 S.Ct. 2875, 77 L.Ed.2d 469, 481 (1983).

sources other than the petitioners, then "the values behind the commercial speech doctrine would not be very much threatened," since the doctrine was enacted primarily to protect consumers rather than advertisers.<sup>15</sup> This reasoning, not only confuses the interests of manufacturers and sellers of liquor with the interests of the petitioners, who include outdoor advertising and other media businesses that operate in Mississippi,<sup>16</sup> but severely diminishes the commercial free speech

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<sup>15</sup>718 F.2d 750-51, App. A at 49a. The en banc opinion also states that the fact that "the liquor industry spends a billion dollars a year on advertising" and the fact that the petitioners have pursued their case so vigorously constitute sufficient evidence for the court of appeals to reverse the trial court, regardless of factual findings made by the lower court. 718 F.2d at 750, App. A at 47-48a.

<sup>16</sup>In Bigelow v. Virginia, 421 U.S. 808, 828 (1975), this Court recognized that advertising prohibitions against publishers, rather than advertisers, incur "more serious First Amendment overtones."

protection granted to speakers, as well as listeners.

## II.

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW CONCERNING THE STANDING OF MEDIA BUSINESSES TO CHALLENGE RESTRICTIONS ON COMMERCIAL SPEECH ON EQUAL PROTECTION GROUNDS IN CONFLICT WITH THE REASONING OF OPINIONS OF THIS COURT AND IN SUCH A MANNER THAT THIS COURT'S GUIDANCE IS NEEDED TO CLARIFY AND PROTECT THE INTERESTS OF SPEAKERS OR ADVERTISERS IN THE FREE FLOW OF COMMERCIAL INFORMATION

This case is also important in that it is the first case<sup>17</sup> to come before this Court involving the issue of whether the right to convey nondeceptive commercial information concerning a lawful product is a fundamental right subject to a strict

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<sup>17</sup>In Friedman v. Rogers, 440 U.S. 1 (1979) this Court specifically found that the challenged regulation was permissible in that the speech being regulated was deceptive and misleading so as not to be within the constitutional protection extended to commercial speech.

scrutiny review for equal protection purposes.<sup>18</sup> Although acknowledging that Mississippi law applies its ban on advertising unequally as between media whose advertisements originate outside the state from those whose ads originate within the state, the Fifth Circuit has stated that "this fact raises no First Amendment concerns . . . and gives rise to an equal protec-

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<sup>18</sup>The challenged Mississippi laws and regulations apply the ban on liquor advertising unequally to similarly situated groups by creating artificial, arbitrary distinctions between media advertisers who publish or transmit liquor advertisements into Mississippi from locations outside Mississippi and media advertisers who publish or transmit liquor advertisements from within Mississippi. As noted in the panel opinion, Mississippi interprets its regulations so that the advertising ban applies only when the place of publication and/or dissemination of the advertisements is within the state of Mississippi, so that the ban on liquor advertising would not be violated where advertisements were actually printed in Mississippi, shipped to another state, and mailed for distribution from the other state. 701 F.2d at 318. App. B at 86-87a.

tion issue requiring only minimal scrutiny."  
718 F.2d at 753, App. A at 58a.

Despite that the strict scrutiny test, rather than the rational-basis standard of review, has been consistently applied to equal protection claims where legislation infringes upon right of freedom of speech,<sup>19</sup> the Fifth Circuit has ruled that neither strict nor intermediate scrutiny of legislative classifications involving First Amendment rights will be applied unless the court first finds that the challenged law also violates the First Amendment.<sup>20</sup> The en banc opinion, thus, rejects the premise that once liquor advertising is determined to be entitled to First

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<sup>19</sup>Police Department of Chicago v. Mosely, 408 U.S. 92 (1972); Stanley v. Georgia, 394 U.S. 557, 549 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); NAACP v. Buttons, 371 U.S. 415 (1963).

<sup>20</sup>718 F.2d at 752, App. A at 55a.

Amendment protection by concerning "lawful activity" and by not being "misleading,"<sup>21</sup> the right to transmit such commercial information is "a fundamental right" which automatically triggers strict equal protection scrutiny of any legislative classifications of advertising in that the right to transmit such information is a right "guaranteed by the Constitution" within the meaning of San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33-34 (1973).

In Central Hudson, this Court characterized commercial speech as "expression related solely to the economic interest of the speaker and its audience" and explained that "commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible

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<sup>21</sup>Central Hudson, 447 U.S. at 556.

dissemination of information."<sup>22</sup> In Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), media businesses which disseminated commercial information from the speaker (advertiser) to the consumer were implicitly recognized as having a protected right to disseminate such information and as having standing to challenge restrictions on these rights.<sup>23</sup> Nevertheless, in direct conflict with the principles announced by this Court, the en banc opinion of the Fifth Circuit states that petitioners cannot assert a meaningful

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<sup>22</sup>447 U.S. at 561-62, citing Friedman v. Rogers, 440 U.S. 1 (1979) Bates v. State Bar of Arizona, 433 U.S. 350 (1977); and Virginia Pharmacy Board v. Virginia Citizens Consumers Council, 425 U.S. 748 (1976) (emphasis added).

<sup>23</sup>See also Memphis Publishing Co. v. Leech, 539 F. Supp. 405, 412-13 (W.D. Tenn. 1982) (publications' and publishers' equal protection rights violated by statute which imposed warning requirement on certain publications but not on other media in which alcohol was advertised).

equal protection claim entitled to strict scrutiny, since "the commercial speech doctrine is concerned primarily with the level and quality of information reaching the listener," rather than advertisers or media interest. 718 F.2d 752, App. A, at 57-58a.

The consequences of the Fifth Circuit's refusal to recognize that speakers and their media representatives have a fundamental right to disseminate commercial information will extend to cases which do not involve liquor advertisements. Accordingly, this case is of critical importance to all advertisers and media representatives who may be treated unfairly by virtue of arbitrary legislative classifications which do not serve to promote or advance the asserted legislative goal.

#### CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review

the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDICES - VOL. 1-3  
TABLE OF CONTENTS

	Page
APPENDIX A (VOL. 1) EN BANC OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, OCTOBER 3, 1983 .....	1a
APPENDIX B (VOL. 2) PANEL OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, MARCH 11, 1983 .....	73a
APPENDIX C (VOL. 3) ORDER OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FOR REHEARING EN BANC MARCH 11, 1983 .....	161a
APPENDIX D (VOL. 3) OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION, FEBRUARY 8, 1982 .....	163a
APPENDIX E (VOL. 3) JUDGMENT OF UNITED STATES COURT OF APPEALS ON REHEARING EN BANC OCTOBER 31, 1983 .....	223a
APPENDIX F (VOL. 3) CONSTITUTIONAL PROVISIONS STATUTES, AND REGULATIONS INVOLVED .....	226a

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VOLUME 1 OF APPENDIX TO  
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APPENDICES - VOL. 1-3  
TABLE OF CONTENTS

	Page
APPENDIX A (VOL. 1) EN BANC OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, OCTOBER 3, 1983 .....	1a
APPENDIX B (VOL. 2) PANEL OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, MARCH 11, 1983 .....	73a
APPENDIX C (VOL. 3) ORDER OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FOR REHEARING EN BANC MARCH 11, 1983 .....	161a
APPENDIX D (VOL. 3) OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION, FEBRUARY 8, 1982 .....	163a
APPENDIX E (VOL. 3) JUDGMENT OF UNITED STATES COURT OF APPEALS ON REHEARING EN BANC OCTOBER 31, 1983 .....	223a
APPENDIX F (VOL. 3) CONSTITUTIONAL PROVISIONS STATUTES, AND REGULATIONS INVOLVED .....	226a

APPENDIX A

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

Nos. 80-3762, 82-4076

KATHY DUNAGIN, et al.,

Plaintiffs-Appellants,

v.

THE CITY OF OXFORD, MISSISSIPPI, et al.,

Defendants-Appellees,

The State of Mississippi,

Intervenor-Appellee.

LAMAR OUTDOOR ADVERTISING, INC., et al.,

Plaintiffs-Appellees,

v.

MISSISSIPPI STATE TAX COMMISSION, et al.,

Defendants-Appellants.

Oct. 31, 1983

Before CLARK, Chief Judge, BROWN,  
GOLDBERG, GEE, REAVLEY, POLITZ, RANDALL,

TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY  
and HIGGINBOTHAM, Circuit Judges.\*

REAVLEY, Circuit Judge:

Mississippi is one of several states which significantly restrict liquor advertising by the local media.<sup>1</sup> Two suits were filed attacking, principally on First Amendment grounds, the Mississippi law. The District Courts for the Northern and Southern Districts of Mississippi reached opposite judgments in those cases.

Dunagin v. City of Oxford, 489 F.Supp. 763 (N.D. Miss. 1980) (upholding); Lamar Outdoor Advertising, Inc. v. Mississippi

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\*Judge Alvin B. Rubin recused himself and did not participate in this decision.

<sup>1</sup>See Fla. Stat. Ann. § 561.42(10)-(12) (West Supp. 1983); Mass. Gen. Laws Ann. ch. 138, § 24 (West 1974); Utah Code Ann. §§32-7-26 to 28 (1953 & Supp. 1981); Okla. Const. art. XXVII, § 5 and Okla. Stat. Ann. tit. 37, § 516 (West Supp. 1982).

State Tax Commission, 539 F.Supp. 817

(S.D. Miss. 1982) (invalidating).<sup>2</sup> We uphold the constitutionality of the Mississippi law.

### I. The Mississippi Law

Until 1966 the possession and sale of alcohol were banned in Mississippi. The state then accepted the impossibility of enforcement of total prohibition and enacted a local option law, allowing each county or judicial district therein to

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<sup>2</sup>A panel of this court heard the consolidated appeal and decided the law was unconstitutional. Before delivery of that opinion, however, the 10th Circuit upheld the Oklahoma law in Oklahoma Telecasters Ass'n. v. Crisp, 699 F.2d 490 (10th Cir. 1983), petition for cert. filed, 51 U.S.L.W. 3863 (May 3, 1983). Under the procedure of this circuit governing when a panel proposes to issue a decision that initiates a conflict with another circuit, the proposed opinion was first circulated to all active judges of this court. An en banc poll was requested, and the case was voted en banc. The panel opinion was then published, though vacated: 701 F.2d 314, 335.

vote an end to the prohibition that otherwise continues throughout the state. Miss. Code Ann. §§ 67-1-1 et seq. (1973). Mississippi did not drop its objection to intoxicants by enacting the 1966 law; it reannounced the state policy of prohibition while allowing local exceptions under strict regulation:

The policy of this state is reannounced in favor of prohibition of the manufacture, sale, distribution, possession and transportation of intoxicating liquor .... The purpose and intent of this chapter is to vigorously enforce the prohibition laws throughout the state, except in those counties voting themselves out from under the prohibition law in accordance with the provisions of this chapter, and, in those counties, to require strict regulation and supervision of the manufacture, sale, distribution, possession and transportation of intoxicating liquor....

Id. § 67-1-3. At the time of trial in Lamar Outdoor Advertising, thirty-five counties and four judicial districts remained "dry," while forty-three counties and four judicial districts had voted to legalize liquor. The wet and dry counties

are spread across the state in a checkerboard pattern, with the majority of the population residing in wet counties.

Pursuant to its rulemaking authority granted by the local option law, id. § 67-1-37(e), the Mississippi State Tax Commission promulgated Regulation No. 6, which prohibits most advertisements that "originate" within the state.<sup>3</sup> The

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<sup>3</sup>The regulation provides:

No person, firm or corporation shall originate advertisement in this State, dealing with alcoholic beverages by any means whatsoever, including but not limited to newspapers, radio, television, circular, dodger, word of mouth, signs, billboards, displays or any other advertising media, except as follows:

(1) On the front of any licensed retail package store building, and no higher than the top of the roof of the permitted place of business at its highest point, there may be printed without illumination, in letters not more than eight (8) inches high, the name of the business, the permit number thereof, which may be preceded by the words

(Footnote continued)

plaintiffs challenged this regulation, as well as Miss. Code Ann. § 67-1-85 (1973)

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(Footnote continued)

"A.B.C. Permit No. \_\_\_\_", and the words "Package Liquor Sold Here". Where the package retail store is located in a building of more than one story in height, the top of such sign shall not be higher than the top of the first story.

(2) A package retail permittee may advertise merchandise inside the permitted place of business by means of a display or displays, signs or placards, or notices, without special illumination. No displays, signs, placards or notices will be permitted in windows. No displays, signs, placards, notices, shelves, counters, or other fixtures shall be constructed or arranged in such a manner as to attract attention from outside the building.

(3) The holder of an on-premises retailer's permit may use the word "lounge", or other similar words descriptive of the facilities available at the permittee's principal place of business, in letters not more than eight (8) inches high and without special illumination, on signs located on the permittee's premises. The use of the word "lounge", but no other words of a similar nature, will be permitted on billboards in letters not more than eight (8) inches high.

(Footnote continued)

which prohibits most forms of liquor sign advertising as well.\*

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(Footnote continued)

(4) In other advertising media, an on-premises permittee may use the word "lounge", but no other words of a similar nature, including, specifically, but not limited to "cocktails", "bar", and "happy hour". The word "lounge" must be subordinated by restaurants to advertising placed for the other facilities offered at the place of business.

(5) All advertising not specifically permitted by statute or regulation is prohibited. Advertising of any type whatsoever about which a permittee may be in doubt should be submitted to the State Tax Commission for approval.

\*The statute provided:

No holder of a package retailer's permit shall have any sign, lighted or otherwise, or printing upon the outside of the premises covered by his permit advertising, announcing or advising of the sale of alcoholic beverages in or on said premises. However, on the front of said premises there may be printed, in letters not more than eight (8) inches high, the name of the business, the permit number thereof, which may be preceded by the words "A.B.C. Permit No." and the words

(Footnote continued)

The combined effect of Regulation No. 6 and section 67-1-85 is that there are no billboards advertising hard liquor or wine

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(Footnote continued)

"Package Liquors Sold Here." In addition, no alcoholic beverages, price list or promotional matter shall be kept, stored or displayed in the windows or other openings of said premises. An open window space or spaces not exceeding sixty square feet in area in the aggregate, and an open space of not exceeding twenty square feet in a front door, may be left open to view. The commission shall have the power and authority to adopt and enforce reasonable rules and regulations to compel compliance with the provisions of this section.

It shall be unlawful to advertise alcoholic beverages by means of signs, billboards, or displays on or along any road, highway, street, or building.

This section shall not be construed so as to prohibit the commission from promulgating rules and regulations permitting the holder of an on-premises retailer's permit to include in signs located on the holder's premises and in advertisements of the holder's principal business, the word "lounge" or other similar words descriptive of the facilities available at such principal place of business without referring specifically to

(Footnote continued)

in Mississippi. Local newspapers printed and distributed within the state are similarly restricted. Radio and television stations operating within the state cannot carry wine commercials, and must delete such advertisements from incoming network programming.

There are some exceptions to this ban upon the advertising of alcoholic beverages. Beer advertisements are generally allowed in all media.<sup>6</sup> A retail

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(Footnote continued)  
alcoholic beverages.

Another statute banning liquor advertisements, Miss. Code Ann. § 97-31-1 (1972), is limited in scope to the provisions of the 1966 local option law, as explained in the panel opinion. 701 F.2d at 317.

<sup>6</sup>As the district court in Dunagin explained, section 97-31-1 was amended in 1934 to allow such advertisements. 489 F.Supp. at 767 n. 4. While only light beer and wines of less than four percent alcohol by weight are expressly exempted from regulation, see sections 67-1-5(a), 67-3-5, the record indicates that brand name beer is generally advertised in Mississippi. Native wines can also now be

(Footnote continued)

package store is allowed under Regulation No. 6 to erect on-site signs with the message "Package Liquor Sold Here" along with its permit number, and may advertise inside the premises. Bars and restaurants can use the word "lounge" on signs and in other media.

The state has interpreted its law to mean that advertisements must originate within the state to be subject to its regulation. Hence, television and radio stations in other states broadcast liquor commercials that reach in-state viewers and listeners. Newspapers and magazines containing liquor advertisements from other states are mailed into the state, and newsstands in Mississippi are allowed

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(Footnote continued)  
advertised on billboards, except as to price, under an express exception in section 67-1-85. This exception became effective in July 1982, after the district court decisions in this case, and does not color our analysis today.

to sell such publications. The state has even taken the position that a publication printed in Mississippi but mailed for distribution in Mississippi from another state is not subject to regulation. The state has also interpreted federal regulations to prohibit it from interrupting or deleting wine commercials in cable television transmissions sent from outside the state. See 47 C.F.R. § 76.55 (1982).

### II. The First Amendment and Liquor Regulation

Those challenging the advertising ban argue primarily that it violates the First Amendment. They contend that this advertising falls within that limited protection afforded pure commercial speech which does "no more than propose a commercial transaction," Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976) and

which is "related solely to the economic interests of the speaker and its audience," Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 561, 100 S.Ct. 2343, 2348, 65 L.Ed.2d 341 (1980).<sup>6</sup>

#### A. The Scope of Commercial Speech Protection

While we need not so hold, there may be no First Amendment protection of purely commercial advertising of those products which the state could entirely proscribe.<sup>7</sup>

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<sup>6</sup>For a thoughtful discussion of the commercial speech doctrine, see Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va.L.Rev. 1 (1979).

<sup>7</sup>Justice Blackmun, however, has stated that "I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to 'dampen' demand for or use of the product." Central Hudson Gas, supra, 447 U.S. at 574, 100 S.Ct. at 2355 (concurring).

Or, if by virtue of its police power the state may prohibit or severely limit a trade or conduct (e.g., prostitution, hand-guns, explosive devices, marijuana, pipes and paraphernalia designed to be used with illegal drugs), the state may be entitled to allow the trade but restrict the advertising without having to justify the restriction by balancing the state interest against the public interest in the commercial speech. The Court has not expressly excepted this category of advertising from commercial speech protection. It has excluded advertising of illegal activity from the protection. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 388-389, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973). And restrictions on false, deceptive, and misleading commercial speech are permissible. Friedman v. Rogers, 440 U.S. 1, 9, 99 S.Ct. 887, 893, 59 L.Ed.2d 100 (1979). Thus far, the Court has written

to place commercial speech under protection where "it at least concern[s] lawful activity and [is] not ... misleading." Central Hudson Gas, 447 U.S. at 566, 100 S.Ct. at 2351.

The Court may or may not choose to exclude from protection the truthful advertising of lawful trades or activities which the state has so great an interest in abating that they are subject to prohibition. It probably makes no difference, however, whether this category of advertising is treated as outside of commercial speech protection or whether the Central Hudson Gas four-part test, discussed below, is applied, because cases of this category likely present state interests which justify advertising restrictions that pass the latter test as a matter of law.

The state argues that liquor advertising is excluded from protection by the previous opinions of the Supreme Court

because that advertising does promote illegal activity and is inherently misleading. We do not agree with these contentions.

The illegality argument is based on the fact that nearly half of the counties in the state are dry, and the fact that even in the wet counties, the manufacture, sale and distribution of liquor are only legal in limited areas -- municipalities, qualified resort areas and clubs, Miss. Code Ann. § 67-1-7 (1973) -- and even consumption is banned in certain areas of wet counties, such as public schools and colleges, id. § 67-1-37(g). The state reasons that liquor advertising would therefore necessarily relate to unlawful activity. The district court in Dunigan agreed:

The Local Option Law does not expressly forbid the advertising of alcoholic beverages in "dry" areas, but it is beyond peradventure that such advertising must contribute to and encourage violation of the statute. This is true whether or not

the newspaper is circulated only in a "dry" county because advertisement of liquor is apt to encourage consumers in "dry" counties to violate the law by purchasing liquor in "wet" counties for transportation home. This factor is exacerbated in the case of The Daily Mississippian because its principal readers are University students, particularly mobile citizens who come to Oxford from all sections of Mississippi to attend school. Some students doubtless purchase liquor in Oxford to take with them when they return home or visit with friends or relatives in "dry" counties.

Because liquor advertising promotes activity illegal in a substantial portion of Mississippi, we hold that the State may regulate The Daily Mississippian's advertising of it even to the point of an absolute ban.

489 F.Supp. at 771.

If Mississippi cannot prohibit advertising because of the general effect upon liquor consumption, the state will not be entitled to prohibit advertising simply because it might stimulate the thirst of a consumer to the point where he elects to violate the local option law. The Mississippi laws under attack prohibit the advertisement of what may be done lawfully

in Mississippi; those laws do not forbid the advertiser's promotion of violation of Mississippi law. The commercial speech doctrine would disappear if its protection ceased whenever the advertised product might be used illegally. Peanut butter advertising cannot be banned just because someone might someday throw a jar at the presidential motorcade.

The state then argues that liquor advertising is not protected because it is misleading: falsely identifying alcohol with "the good life" instead of disclosing the personal and social disasters it threatens, and particularly affecting the young and unsophisticated children in the public audience.

Again, if Mississippi cannot prohibit this advertising because of the strength of the state interest against liquor consumption, the state will have little success in preventing the advertising merely because it fails to tell the whole truth

about its product. Nearly all advertising associates the promoted product with a positive or alluring lifestyle or famous or beautiful people. Our policy is to leave it to the public to cope for themselves with Madison Avenue panache and hard sells. A central teaching of the commercial speech doctrine was summed up in Central Hudson Gas:

In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interests if only they are well enough informed, and ... the best means to that end is to open the channels of communication rather than to close them ...." Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

447 U.S. at 562, 100 S.Ct. at 2349 (citations omitted).

As for the argument that the advertising will reach young children, "the government may not 'reduce the adult popu-

lation ... to reading only what is fit for children.'" Bolger v. Youngs Drug Products Corp., \_\_\_\_ U.S. \_\_\_, \_\_\_, 103 S.Ct. 2875, 2884, 77 L.Ed.2d 469 (1983) (quoting Butler v. Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 525, 1 L.Ed.2d 412 (1957)).

#### B. The Twenty-first Amendment

If there is any instance where a state can escape First Amendment constraint while prohibiting truthful advertising promoting lawful sales, it would be where the product being sold is intoxicating liquor. Section two of the Twenty-first Amendment states:

The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

This clause serves primarily to create an exception to the normal operation of the Commerce Clause. Craig v. Boren, 429 U.S.

190, 206, 97 S.Ct. 451, 461, 50 L.Ed.2d 397 (1976). Its effect goes much further and is very significant to the case before us.

In Castlewood International Corp. v. Simon, 596 F.2d 638, 642 (5th Cir. 1979), vacated and remanded, 446 U.S. 949, 100 S.Ct. 2914, 64 L.Ed.2d 806 (1980), panel opinion reinstated, 626 F.2d 1200 (5th Cir. 1980), we explained that section two of the Twenty-first Amendment:

is unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product -- intoxicating liquors. See California v. LaRue, 409 U.S. 109, 115, 93 S.Ct. 390 [395], 34 L.Ed.2d 342 (1972).

There can be no doubt that this was the desire of those who framed the Twenty-first Amendment. As originally proposed, the Amendment contained three substantive sections, the third of which provided:

Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.

76 Cong. Rec. 4138 (1933). Section Three was deleted because of Congressional concern that its grant of concurrent power to regulate liquor to Congress would be construed to support the supremacy of federal regulation of liquor sales. As Senator Wagner pointed out, "We have expelled the system of national control through the front door ... and readmitted it forthwith through the back door of Section 3." 76 Cong. Rec. 4145 (1933). This would have been the "ironical result of an amendment designed to restore to the states control of their liquor problem." Id. With these concerns in mind, Section Three was deleted in the final version of the amendment.

Thus, any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme.

Clearly, state liquor laws are not immune from constitutional scrutiny. The Supreme Court has struck down such laws found in violation of the Establishment Clause, Larkin v. Grendel's Den, Inc., \_\_\_ U.S. \_\_\_, 103 S.Ct. 505, 74 L.Ed.2d 297

(1982), federal antitrust laws passed under the Commerce Clause, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), the Equal Protection Clause of the Fourteenth Amendment, Craig v. Boren, supra, federal procedural due process requirements, Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), and the Export-Import Clause, Department of Revenue v. James B. Bean Distilling Co., 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964). Nevertheless, the Supreme Court has twice, in examining the interface of the First and Twenty-first Amendments, given an unusual amount of deference to state liquor regulations.

In California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), the plaintiffs challenged a California regulation banning nudity, and live performances, films and pictures depicting certain

actual and simulated sexual acts, in nightclubs and bars where alcoholic beverages were sold. The Supreme Court did "not disagree with the District Court's determination that these regulations on their face would proscribe some forms of visual presentation that would not be found obscene" under Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) and later cases. 409 U.S. at 116, 93 S.Ct. at 395. The Court held, however that the normal analyses of obscenity under Roth and communicative conduct under United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) did not apply because of the added consideration of the Twenty-first Amendment. It found that "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals," 409 U.S. at 114, 93 S.Ct. at 395, and that

"the case for upholding state regulation in the area of the Twenty-first Amendment is undoubtedly strengthened by that enactment," id. at 115, 93 S.Ct. at 395 (emphasis added). The Court found that the state's conclusions as to the need for the regulations were not "irrational," or "unreasonable," and that "wide latitude as to the choice of means to accomplish a permissible end must be accorded the state agency that is itself the repository of the State's power under the Twenty-first Amendment." Id. at 116, 93 S.Ct. at 395. The opinion of the Court concludes with the following passage:

The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution.

Id. at 118-19, 93 S.Ct. at 397.

In New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981), the Court upheld a state ban on topless dancing in liquor establishments. Notably, Bellanca was decided after Central Hudson Gas and Craig v. Boren. Despite arguments that the acts in question did not partake of gross sexuality as in LaRue and that there was "no legislative finding that topless dancing poses anywhere near the problem posed by acts of 'gross sexuality,'" 452 U.S. at 717, 101 S.Ct. at 2601, the Court upheld the regulation, concluding that:

[T]he elected representatives of the State of New York have chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption. Given the "added presumption in favor of the validity of the state regulation" conferred by the Twenty-first Amendment, California v. LaRue, 409 U.S., at 118, 93 S.Ct., at 397, we cannot agree with the New York Court of Appeals that the statute violates the United States Constitution. Whatever artistic or communicative value may attach to topless dancing is overcome

by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts.

Id. at 718, 101 S.Ct. at 2601.

The test applied in LaRue and Bellanca is less strict than that applied in Central Hudson Gas. First, the former test employees a rational basis scrutiny, requiring only a reasonable or rational means of reaching a permissible end, as opposed to a higher level of scrutiny imposed by the latter test. Second, LaRue and Bellanca employ a presumption in favor of validity, while ordinarily the burden is on the party defending a restriction on speech, even in a commercial speech case. See Bolger v. Youngs Drug Products Corp., \_\_\_ U.S. \_\_\_, \_\_\_ n. 20, 103 S.Ct. 2875, 2883 n. 20, 77 L.Ed.2d 469 (1983). LaRue and Bellanca are cases where fully protected speech was constitutionally re-

stricted because the restriction was incidental to the rational regulation of liquor. It may follow that because any restriction on the advertisement of liquor itself is necessarily related, rationally and directly, to liquor regulation, restrictions placed upon that advertisement by the states are consistent with the First Amendment.

C. Queensgate and Capital Broadcasting

The state argues that two rulings by the Supreme Court have precedential effect here. The first is Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St.2d 361, 433 N.E.2d 138, appeal dismissed, \_\_\_\_ U.S. \_\_\_, 103 S.Ct. 31, 74 L.Ed.2d 45 (1982). That case involved a First Amendment challenge to an Ohio regulation that generally permitted liquor advertising, but required that liquor permit holders "not advertise the price per

bottle or drink of any alcoholic beverage, or in any manner refer to price or price advantage except within their premises and in a manner not visible from the outside of said premises." 433 N.E.2d at 139 n.

1. The regulation was upheld by the Ohio Supreme Court, and an appeal was taken to the United States Supreme Court, the jurisdictional statement questioning whether the regulation violated the First Amendment. Mississippi argues that the summary dismissal for want of a substantial federal question by the Supreme Court in Queensgate binds us in this case.

The Supreme Court has declared that while summary dispositions of appeals are decisions on the merits that bind lower federal courts, such decisions extend only to "the precise issues presented and necessarily decided by those actions."

Mandel v. Bradley, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977).

Queensgate did not involve the precise issues presented here, since the Ohio regulation was more narrowly drawn than the Mississippi regulation. The Ohio statute only banned certain price advertisements and might be viewed as a "time, place and manner" restriction, unlike the Mississippi regulation.

Nevertheless, we agree with the Tenth Circuit, which when recently examining Oklahoma's liquor advertising ban, noted that "Queensgate manifestly presented an issue concerning the tension between the First and Twenty-first Amendments." Oklahoma Telecasters Ass'n. v. Crisp, 699 F.2d 490, 497 (10th Cir. 1983), cert. granted sub nom. Capital Cities Cable, Inc. v. Crisp, \_\_\_\_ U.S. \_\_\_, 103 S.Ct. \_\_\_, 77 L.Ed.2d \_\_\_, 52 U.S.L.W. 3230 (Oct. 4, 1983) (No. 82-1795). We also agree with the state that the price advertising at issue in Queensgate lies near the center of the commercial speech doctrine and is

probably as likely to deserve commercial speech protection as the "lifestyle" advertisements that the state alleges the plaintiffs in this case are interested in displaying. See Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (upholding lawyer price advertising); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976) (upholding drug prescription price advertising and noting that "[t]he 'idea' he wishes to communicate is simply this: 'I will sell you the X prescription drug at the Y price.'")

We take a middle road on this issue, following the approach taken in Crisp, supra, and Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), cert. denied, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979). While the summary dismissal by the Supreme Court in Queensgate must "cau-

tion us" against finding the Mississippi regulations unconstitutional, Plante, 575 F.2d at 1125-26, we nevertheless are not relieved of our duty "to undertake an independent examination of the merits."

Mandel v. Bradley, supra, 432 U.S. at 177, 97 S.Ct. at 2241.

The state and amicus parties also argue that the Supreme Court's summary affirmance in Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582 (D.D.C. 1971) (three-judge court), aff'd mem., 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972), operates as compelling authority in this case. The decision, upholding a federal ban on broadcasting of cigarette commercials, is of limited precedential value for two reasons. First, Capital Broadcasting antedated the emergence of the commercial speech doctrine in the mid-1970's, and was based on the view that commercial speech was completely outside the protection of the First Amendment.

Second, the Supreme Court has itself expressly limited Capital Broadcasting to "the special problems of the electronic broadcast media," Virginia Board of Pharmacy, supra, 425 U.S. at 773, 96 S.Ct. at 1831, that make that form of communication "especially subject to regulation in the public interest," Bigelow v. Virginia, 421 U.S. 809, 825 n. 10, 95 S.Ct. 2222, 2234 n. 10, 44 L.Ed.2d 600 (quoting Capital Broadcasting, 333 F.Supp. at 584).

### III. The Central Hudson Gas Test

We base our decision, ultimately, upon the application of the Supreme Court's analysis in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980):

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful

activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566, 100 S.Ct. at 2351.

In Bolger v. Youngs Drug Products Corp., \_\_\_ U.S. \_\_\_, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983), the latest Supreme Court commercial speech case at this writing, the Court reaffirmed the Central Hudson Gas test as the basic method of deciding commercial speech cases.

#### A. Parts One and Two: Protected Speech and State Interest

We assume, following the discussion above, that liquor advertising in Mississippi should be treated at the outset as protected commercial speech. There can be no question, on the next step, that Mississippi does assert a substantial interest, which the state describes to be

"safeguarding the health, safety and general welfare of its citizens by controlling the artificial stimulation of liquor sales and consumption created by the advertising of liquor." Whatever the medicinal or social value for those who use alcohol moderately, alcohol abuse takes an enormous toll from society and the lives of many people. Testimony in Lamar Outdoor Advertising concentrated on the role alcohol plays in coronary heart disease, gastrointestinal cancer, cirrhosis of the liver, traffic accidents, and occupational and family problems. The court in Dunagin took judicial notice of these problems. 489 F.Supp. at 771 n. 11.

B. Part Three: Direct Advancement of The State Interest

The dispute begins with the third part of the Central Hudson Gas test. Does Mississippi's restriction against advertising directly advance the asserted state

interest? In Dunagin, the trial judge, relying on the expert affidavit presented or his own knowledge and common sense, concluded in a summary judgment that "[t]he purpose of advertising alcoholic beverages is to promote consumption and thereby stimulate sales of alcoholic beverages. Increased sales of these beverages are highly correlated with increased problems associated with their use." 489 F.Supp. at 771 n. 11.

Other courts facing similar fact situations have reached the same conclusion -- that advertising and consumption are directly linked. In Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St.2d 361, 433 N.E.2d 138, 142, appeal dismissed, \_\_\_ U.S. \_\_\_, 103 S.Ct. 31, 74 L.Ed.2d 45 (1982), the Ohio Supreme Court found that "[t]he advertising of drink prices and price advantages would encourage and stimulate excessive consumption of alcoholic beverages; and advertising pro-

hibition aids the interest in preventing that consumption." In Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490, 501 (10th Cir. 1983), cert. granted sub nom. Capital Cities Cable, Inc. v. Crisp, \_\_\_ U.S. \_\_\_, 103 S.Ct. \_\_\_, 77 L.Ed.2d \_\_\_, 52 U.S.L.W. 3230 (Oct. 4, 1983) (No. 82-1795), the Tenth Circuit found it not "constitutionally unreasonable for the State of Oklahoma to believe that advertising will not only increase sales of particular brands of alcoholic beverages but also alcoholic beverages generally." See also Williams v. Spencer, 622 F.2d 1200, 1205 (4th Cir. 1980) (agreeing with trial court's judicial notice that "an advertisement encouraging the use of drugs encourages actions which in fact endanger the health or safety of students"); Capital Broadcasting v. Mitchell, 333 F.Supp. 582, 586 (D.D.C. 1971) (three-judge court), aff'd mem., 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472

(1972) (noting "close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people").

The trial judge in Lamar Outdoor Advertising heard testimony from experts on the issue. The advertisers' expert, a professor of sociology who has specialized in alcoholism, testified that advertising only affected brand loyalty and market share, rather than increasing overall consumption or consumption of individual consumers. The state's expert, a medical doctor and professor of psychiatry who has done research in alcoholism, testified that there was "a strong correlation between an increase in alcohol advertising and consumption." 539 F.Supp. at 821. The trial court found that "[d]efendants failed to produce concrete scientific evidence to substantiate their position that alcohol advertising artificially stimulates consumption thereof," and concluded

that Mississippi's regulation of advertising "does little to directly advance the government's interest in promoting temperance." Id. at 829.\*

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"The degree to which an appellate court should defer to the "fact" findings of a trial judge as to the latest truths in the social sciences is an interesting question. The argument can be made that as long as the trial court applied the right legal test or the appropriate level of scrutiny, his findings under each prong of the test, here the Central Hudson Gas test, and his decision should be upheld on appeal. The Lamar Outdoor Advertising court's finding that advertising restrictions do not directly advance the state's interests since there is no scientifically concrete link between advertising and alcohol consumption sounds very much like a finding of fact. Should this finding be subject only to a clearly erroneous standard of review? Clearly not.

In the first place, the issue of whether there is a correlation between advertising and consumption is a legislative and not an adjudicative fact question. It is not a question specifically related to this one case or controversy; it is a question of social factors and happenings which may submit to some partial empirical solution but is likely to remain subject to opinion and reasoning. See Fed.R.Evid. 201 advisory committee note. That reasoning is the  
(Footnote continued)

The plaintiffs in Lamar Outdoor Advertising support their standing by estimating that they lose hundreds of

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responsibility of legislators and judges, assisted by scholars as well as social scientists. The specific issue here was undoubtedly considered by the Mississippi Legislature when local option and the curtailment of liquor consumption were being studied. Now the issue has moved to the judicial stage. If the legislative decision is not binding at this stage, at least it carries great weight. Certainly it cannot be thrust aside by two experts and a judicial trier of fact.

The writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court. E.g., Barefoot v. Estelle, U.S. \_\_\_, n. 7, 103 S.Ct. 3383, 3397 n. 7, 77 L.Ed.2d 1090 (1983)

(validity of predictions of violent behavior); New York v. Ferber, \_\_\_ U.S. \_\_\_, n. 9, 102 S.Ct. 3348, 3355 N. 9, 73 L.Ed.2d 1113 (1982) (the effect upon the child used as a subject for pornographic materials); Ballew v. Georgia, 435 U.S. 223, 231 n. 10, 233 n. 11, 98 S.Ct. 1029, 1034 n. 10, 1035 no. 11, 55 L.Ed.2d 234 (1978) (effect of the size of jury upon deliberation and verdict); Gregg v. Georgia, 428 U.S. 153, 184 n. 31, 96 S.Ct. 2909, 2930 n. 31, 49 L.Ed.2d 859 (1976) (the deterrent effect of capital punishment); Paris Adult Theatre I v. Slaton,

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thousands of dollars of advertising income by virtue of the Mississippi restriction.

See Metromedia, Inc. v. City of San Diego,

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413 U.S. 49, 58 n. 8, 93 S.Ct. 2628, 2635 n. 8, 37 L.Ed.2d 446 (1973) (the relation between obscenity and socially deleterious behavior); Brown v. Board of Education of Topeka, 347 U.S. 483, 494 n. 11, 74 S.Ct. 686, 692 n. 11, 98 L.Ed. 873 (1954) (the effect of segregation upon minority children).

Furthermore, the decision on whether a regulation of commercial speech directly advances the state's interest, for example, is an exercise of constitutional adjudication wherein appellate courts play a special role. Applying the legal tests that have evolved in constitutional law invariably requires subtle legal distinctions, a sense of history, and an ordering of conflicting rights, values and interests. The Supreme Court has often warned that each First Amendment case must be analyzed separately, based on the particular method of communication involved, and the values and dangers implicated.

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501, 101 S.Ct. 2882, 2889, 69 L.Ed.2d 800 (1981); FCC v. Pacifica Foundation, 438 U.S. 726, 748, 98 S.Ct. 3026, 3039, 57 L.Ed.2d 1073 (1978); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557, 95 S.Ct. 1239, 1245, 43 L.Ed.2d 448 (1975); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503, 72 S.Ct. 777, 781, 96 L.Ed. 1098 (1952); Kovacs v. Cooper, 336 U.S. 77, 97, 69 S.Ct. 448, 458, 93 L.Ed. (Footnote continued)

453 U.S. 490, 504 n. 11, 101 S.Ct. 2882,  
2890 n. 11, 69 L.Ed.2d 800 (Justice White,  
for plurality), 544, 101 S.Ct. at 2911

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(Footnote continued)

513 (1949). "The protection available for particular commercial expression turns on the nature both of the expression and of the government interests served by its regulation." Central Hudson Gas, supra, 447 U.S. at 563, 100 S.Ct. at 2350. The questions raised in such cases involve mixed questions of law and fact. In this case, for instance, the extent to which Metromedia, Bellanca, LaRue and other cases temper the Central Hudson Gas test is a legal question.

There are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial. Suppose one trial judge sitting in one state believes a sociologist who has found no link between alcohol abuse and advertising, while another trial judge sitting in another state believes a psychiatrist who has reached the opposite conclusion. A similar situation actually occurred here. Should identical conduct be constitutionally protected in one jurisdiction and illegal in another? Should the fundamental principles of equal protection delivered in Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), be questioned if the sociological studies regarding racial segregation set out in the opinion's footnote 11 are shown to be methodologically flawed? Should the constitu-

(Footnote continued)

(Justice Stevens, dissenting in part)  
(1981). It is beyond our ability to understand why huge sums of money would be

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tionality of the property tax as a means of financing public education, resolved in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), depend on the prevailing views of educators and sociologists as to the existence of a cost-quality relationship in education? Does capital punishment become cruel and unusual when the latest regression models demonstrate a lack of deterrence? The social sciences play an important role in many fields, including the law, but other unscientific values, interests and beliefs are transcendent.

Perhaps for these reasons, the Supreme Court's recent commercial speech and other relevant speech cases indicate that appellate courts have considerable leeway in deciding whether restrictions on speech are justified. In none of them did the Court rely heavily on fact findings of the trial court. In Bolger v. Youngs Drug Products Corp., \_\_\_\_ U.S. \_\_\_, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983), the Court struck down 39 U.S.C. § 3001(e)(2), a law prohibiting the mailing of unsolicited contraceptive advertisements. It agreed that the government had a substantial interest in aiding parents' efforts to control the manner in which their children became informed about birth control. The Court held, however, that the statute provided only the most limited incremental

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devoted to the promotion of sales of liquor without expected results, or continue without realized results. No

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support for the interest asserted, in part by "reasonably assum[ing] that parents already exercise substantial control over the disposition of mail once it enters their mailboxes." 103 S.Ct. at 2884. In Metromedia, despite assertions that "the record is inadequate to show any connection between billboards and traffic safety" the judgment of the Court agreed with the "common-sense" belief of local lawmakers and other courts that billboards do pose substantial traffic safety hazards. 453 U.S. at 508-09, 101 S.Ct. at 2892-93. In Bellanca, the Court again deferred to the "common sense" conclusion of the state legislature that "any form of nudity coupled with alcohol in a public place begets undesirable behavior." 452 U.S. at 718, 101 S.Ct. at 2601. Similarly in Central Hudson Gas, the Court in another apparent exercise of judicial notice found "an immediate connection between advertising and demand for electricity" and therefore a direct link between the ban on advertising and the state interest in conservation. 447 U.S. at 569, 100 S.Ct. at 2353. See also Guzick v. Drebus, 431 F.2d 594, 599 (6th Cir. 1970), cert. denied, 401 U.S. 948, 91 S.Ct. 941, 28 L.Ed.2d 231 (1971) (holding in First Amendment case that, "when dealing with questions of constitutional magnitude, we are not at liberty to accept the fact trier's findings merely because

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doubt competitors want to retain and expand their share of the market, but what businessperson stops short with competitive comparisons? It is total sales, profits, that pay the advertiser; and dollars go into advertising only if they produce sales. Money talks: it talks to the young and the old about what counts in the marketplace of our society, and it talks here in support of Mississippi's concerns.

The approach taken by the Supreme Court in Central Hudson Gas is worthy of study here. There the Court found:

There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

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(Footnote continued)  
we consider them not 'clearly erroneous'" under Fed.R.Civ.P. 52(a)).

447 U.S. at 569, 100 S.Ct. at 2353. The plaintiffs here try to distinguish Central Hudson Gas by arguing that the electric utility in that case was a monopoly, and therefore was not competing for a share of the market as are the advertisers here. In fact, however, the Court expressly found that the utility was in direct competition with other suppliers in certain markets:

Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of inter-fuel competition 45 years ago, see West Ohio Gas Co. v. Public Utilities Comm'n, 294 U.S. 63, 72, 55 S.Ct. 316, 321, 79 L.Ed. 761 (1935). Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice.

Id. at 567.

Metromedia is also instructive. While noting the meager record on the question of whether the billboard ban

directly advanced governmental interests,  
the judgment of the Court continued:

Noting that "[b]illboards are intended to, and undoubtedly do, divert a driver's attention from the roadway," ibid., and that whether the "distracting effect contributes to traffic accidents invokes an issue of continuing controversy," ibid., the California Supreme Court agreed with many other courts that a legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside. We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable. As we said in a different context, Railway Express Agency, Inc. v. New York, supra, [336 U.S. 106] at 109, 69 S.Ct. [463] at 465 [93 L.Ed. 533]:

"We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false."

453 U.S. at 508-09, 101 S.Ct. at 2892-93.

As in Metromedia, the subject of regula-

tion here -- liquor -- must be viewed as a matter of peculiar importance to state and local authorities by virtue of the Twenty-first Amendment.

[1] We conclude that the advertising ban is sufficiently justified to pass constitutional muster. We simply do not believe that the liquor industry spends a billion dollars a year on advertising solely to acquire an added market share at the expense of competitors. Whether we characterize our disposition as following the judicial notice approach taken in Central Hudson Gas, or following the "accumulated, common-sense judgment" approach taken in Metromedia, we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not "concrete scientific evidence" exists to that effect. Moreover, we believe that the added presumption in favor of validity required by LaRue, Bellanca and Queensgate

helps to establish the balance in favor of the state, if balancing be necessary.

The advertisers argued, to the satisfaction of the trial judge in Lamar Out-door Advertising, that even if there is a connection between advertising and consumption, the intrastate advertising ban does no good because Mississippi residents are "inundated" and "saturated" with liquor advertising in broadcasts, magazines and newspapers entering from outside the state. 539 F.Supp. at 829-30.

We do not find this argument compelling for several reasons. First, the plaintiffs would not be pursuing this case so vigorously if the market were truly saturated. They believe that they will find customers interested in further promoting liquor products. Second, their evidence that liquor advertisements appeared in national magazines in the Jackson library, out-of-state radio and television broadcasts and out-of-state

newspapers does not establish that advertising would not dramatically increase if the intrastate ban is invalidated. Again, the willingness of the fifty-six plaintiffs in Lamar Outdoor Advertising to litigate this matter suggests otherwise. Third, this argument cuts both ways. The commercial speech doctrine was created primarily out of concern in protecting consumers and the information they receive. If it were true that consumers are now being inundated with commercial information about liquor in contravention of the state's interests, the values behind the commercial speech doctrine would not be very much threatened.

#### C. Part Four: Extensiveness of The Regulation

Finally, we hold that the advertising restrictions are not more extensive than necessary to serve the state interest, as required by the fourth element of Central

Hudson Gas. Again, we must apply this requirement in light of LaRue, Bellanca and Queensgate. See LaRue, 409 U.S. at 116, 93 S.Ct. at 395 ("wide latitude as to choice of means ... must be accorded the state agency").

[2] The state restrictions on liquor advertising are no broader than necessary to pursue its goal of preventing the artificial stimulation and promotion of liquor sales and consumption. No other types of advertising are restricted.

Again, we find the plurality's opinion in Metromedia helpful:

[W]e reject appellants' claim that the ordinance is broader than necessary and, therefore, fails the fourth part of the Central Hudson test. If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no farther than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows on-site

advertising and some other specifically exempted signs.

453 U.S. at 508, 101 S.Ct. at 2892. By analogy, the state here believes that the advertising itself represents a hazard to the health, safety and welfare of its citizens. The restrictions permit certain types of informational advertising of use to the consumer such as price advertising inside licensed premises, but bar those displays that it believes will encourage excess consumption.

We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state's concern is not that the public is unaware of the dangers of alcohol. See Restatement (Second) of Torts § 402A comment j (1965) (sellers of alcoholic beverages not required to warn of dangers, which are generally known and recognized). The concern instead is that advertising

will unduly promote alcohol consumption despite known dangers.'

The advertisers offer, as an example of constitutional manner and timing of advertising regulation, the prohibition of a billboard, located by a drive-through bar at the edge of a wet county line, announcing that the bar offers "the last chance to buy mixed drinks for the next 30 miles." That prohibition would be proper, they say, because the billboard intentionally promotes dangerous consumption and unlawful transportation while driving 30 miles through the dry county. The mistake of that argument is that it regards the state interest as being opposed only to the unlawful use of liquor. But Mississippi's policy is much broader, as stated

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<sup>8</sup>Cf. Capital Broadcasting, supra, 333 F.Supp. at 585 ("Congress had convincing evidence that the Labeling Act of 1965 had not materially reduced the incidence of smoking").

in the 1966 statute: it is against the sale and possession of intoxicating liquor. All billboards advertising liquor are adverse to that policy and interest for the same reason that the billboard of the last-chance bar would be adverse to a policy against transportation of liquor through a dry county.

#### IV. Equal Protection

The plaintiffs maintain in the alternative that the Mississippi advertising ban violates the Equal Protection Clause of the Fourteenth Amendment, in that it discriminates against the local media by banning intrastate advertising while allowing advertising to enter Mississippi from out-of-state media. The district court in Lamar Outdoor Advertising agreed, finding no rational link between the classification and the goal of controlling the artificial stimulation of the sale and

consumption of artificial beverages. 539 F.Supp. at 830-31.

The plaintiffs ask us to apply the strict scrutiny standard of review, relying on the fundamental rights strand of strict scrutiny equal protection doctrine. The Supreme Court has limited the fundamental rights subject to strict scrutiny to those rights which are explicitly or implicitly guaranteed by the Constitution.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 34, 93 S.Ct. 1278, 1297, 36 L.Ed.2d 16 (1973). Freedom of speech is of course a fundamental right that would ordinarily trigger strict scrutiny. Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). The plaintiffs reason that, since the First Amendment has been extended to commercial speech which concerns lawful activity and is not misleading, strict scrutiny is appropriate.

[3] Strict scrutiny is clearly inappropriate. In this case we have held the Mississippi law entirely legal under the First Amendment, and parties cannot insist on strict scrutiny merely by asserting a First Amendment right that the court ultimately finds not to be violated. Furthermore, in all cases commercial speech is entitled to only a limited measure of protection under a different standard of review. Under the Central Hudson Gas test, the state must demonstrate a substantial interest which is directly advanced by the regulation. If the right to advertise for profits were fundamental, then parties to any particular commercial speech regulation could rely on a stricter standard of review -- requiring a compelling state interest and necessary means chosen to attain it -- by locating an unregulated class of advertisers and insisting on an equal protection analysis by the court.

It is important to recognize that, for identification with the commercial speech doctrine and the interests it protects, there is no classification here on which an equal protection analysis can be based. Commercial speech has been termed "unique because the speech does not advance any value implicating the interests of the speaker in the speech." Note, Constitutional Protection of Commercial Speech, 82 Colum.L.Rev. 720, 750 (1982). The primary interests protected are those of the listener -- the consumer -- in receiving information. In Virginia Board of Pharmacy, the Court made clear that the First Amendment protects the right to receive information, 425 U.S. at 756-57, 96 S.Ct. at 1822-23, and noted that "[a]s to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate," id.

at 763, 96 S.Ct. at 1826. We do not mean to suggest that media advertisers lack standing to challenge commercial speech regulations. See Metromedia, 453 U.S. at 504 n. 11, 101 S.Ct. at 2890 n. 11 (Justice White, for plurality), 544, 101 S.Ct. at 2911 (Justice Stevens, dissenting in part). Nevertheless, "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising ... [and] there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." Central Hudson Gas, 447 U.S. at 563, 100 S.Ct. at 2350.

Hence, unlike other areas of First Amendment protection, the commercial speech doctrine is concerned primarily with the level and quality of information reaching the listener. From this vantage point, there is no classification upon which the plaintiffs can assert a meaning-

ful equal protection claim. From the standpoint of the consumer, all residents in Mississippi have access to liquor advertising from interstate and intrastate sources, and indeed receive a great deal of out-of-state advertising according to the plaintiffs. There is no discrimination against particular classes of consumers in the state.

[4] While the economic interests of the intrastate advertisers are at a disadvantage compared with those of the interstate media, this fact raises no First Amendment concerns for the reasons explained above, and gives rise to an equal protection issue requiring only minimal scrutiny. Under such deferential scrutiny of economic regulation, the classification challenged need only be rationally related to a legitimate state interest, New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976), and is invalid only if "wholly

irrelevant to the achievement of the State's objective," McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct. 1101, 1104, 6 L.Ed.2d 393 (1961).

Most assuredly there is nothing suspect about a state discriminating against its own citizens, in this case advertisers originating messages within the state. The state argues that it lacks jurisdiction to control transmissions and mailings entering its boundaries from other states, and cannot, for practical and legal reasons, block such disseminations. The state has reasonably chosen to restrict its regulation to those over which it has control. The Equal Protection Clause does not require "a legislature to enact a statute so broad that it may well be incapable of enforcement." Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 474, 101 S.Ct. 1200, 1207, 67 L.Ed.2d 437 (1981). We think it exceedingly unlikely that the state could block, jam,

or otherwise ban all magazines, newspapers, cable signals and radio and television broadcasts originating from other states that contain liquor advertisements, as a practical matter, and in the face of the Commerce Clause, the Supremacy Clause and the First Amendment. In upholding a Utah regulation that banned cigarette billboards while allowing cigarette advertisements in interstate publications, Justice Brandeis stated that "[i]t is a reasonable ground of classification that a state has power to legislate with respect to persons in certain situations and not with respect to those in a different one." Packer Corporation v. Utah, 285 U.S. 105, 110, 52 S.Ct. 273, 274, 76 L.Ed. 643 (1932). Furthermore, with economic regulation, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Williamson v. Lee

Optical of Oklahoma, Inc., 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955). The state could have concluded rationally that local advertising was the promotion of intoxicating liquor that was susceptible to regulation.

## V.

We conclude that the Mississippi regulatory scheme is constitutionally valid. The judgment in Dunagin is AFFIRMED. The judgment in Lamar Outdoor Advertising is REVERSED.

JERRE S. WILLIAMS, Circuit Judge, with whom TATE, Circuit Judge, joins specially concurring:

## I.

I agree wholeheartedly with the result reached by the majority. I also am in full agreement with the Court's reliance upon the test developed in Central Hudson Gas & Electric Corp. v. Public Ser-

vice Commission of New York, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980). The application of this test properly leads us to the result reached by the majority.

It is with regret that I cannot join in the majority opinion, however, because of implications it sees in the Twenty-first Amendment. The majority opinion in Part II B discusses the Twenty-first Amendment as having implications justifying unusual and wholly unique intrusions upon the personal liberties of American citizens in the regulation of intoxicating liquor. I concede that there has been some indication of this possible effect of the Twenty-first amendment in California v. LaRue, 409 U.S. 109, 114, 93 S.Ct. 390, 395, 34 L.Ed.2d 342 (1972), and in New York State Liquor Authority v. Bellanca, 452 U.S. 714, 717, 101 S.Ct. 2599, 2601, 69 L.Ed.2d 357 (1981). I view the doctrine as mischievous and insidious.

The purpose of the Twenty-first Amendment was to remove all constitutional inhibitions as to the state's power to control intoxicating liquors as against the powers of the federal government, particularly but not exclusively in the domain of interstate and foreign commerce. It had nothing whatsoever to do with encroachment upon the individual liberties protected in the Constitution. The governments, state and federal, had exactly the same powers to control spirits after the passage of the Twenty-first Amendment as they had before, as against claims of individual liberty under free-speech, due process, and equal protection.

A conclusion that the Twenty-first Amendment justifies greater intrusions upon the constitutional liberties of individual citizens than would otherwise be the case is an insidious doctrine because it holds that the Constitution places

liquor in a totally unique position different from even dangerous drugs and other vice-prone products or occupations.

The power to control the production, sale, advertising, and consumption of intoxicating beverages in ways different from controlling the same social processes as they relate to food products, automobiles, television sets, and the like is based wholly upon the recognition that spirits create special problems which entitle the state to react with special legislative solutions. This recognition has been with us from the beginning of our society right up to the present. It falls in the area of "police power," if you will. It does not depend to any degree upon the Twenty-first amendment.

In recognizing the special problems related to liquor regulation, I have no difficulty whatsoever in agreeing with the cogent analysis of the majority opinion that the control of liquor advertising by

the State of Mississippi does not run afoul of the constitutional protections of individual liberty. To hold otherwise exalts commercialism above the genuine concerns the State of Mississippi has a right to feel for its citizens, and the problems that liquor creates in our society.

## II.

In one other matter I wish to reinforce the analysis in the majority opinion. The Court describes the "battle of the experts" on the question of whether advertising simply induces people to change brands of liquor or actually stimulates consumption. What this battle of the experts was actually asking us to do was to engage in the now outmoded substantive economic due process analysis. The fact that there was a battle of the experts on this issue proved that the issue was one of legislative policy. If the

legislature of the State of Mississippi believes that liquor advertising increases liquor consumption, that is a legislative judgment that it has a right to make. And the fact that there may be some experts who think otherwise justifies testimony before the legislative committee considering the legislation but does not justify a demand that this Court resolve that policy decision. To treat this issue as subject to our power to decide would lapse into the now thoroughly discredited earlier Supreme Court due process analysis which is exemplified by the statement by the Court in the notorious Lochner v. State of New York case, 198 U.S. 45, 57, 25 S.Ct. 539, 543, 49 L.Ed. 937 (1905): "Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week .... There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard

the public health or the health of the individuals who are following the trade of a baker."

It is not for the courts to tell the states that they no longer have power to place reasonable limitations upon the commercial aspects of businesses which the state properly feels create a high level of social concern. The states can ban the sale of liquor entirely, just as they can of dangerous drugs. They can limit the sale to state-owned package stores. They can ration. They can prohibit all consumption of intoxicating beverages in public. They can engage in many types of regulations of varying stringency. To hold that one of those regulations cannot be a restriction on commercial exploitation by way of advertising would be a curious and unjustifiable anomaly.

GEE, Circuit Judge, with whom GOLDBERG, POLITZ, RANDALL and HIGGINBOTHAM, Circuit Judges, join, dissenting:

Judge Reavley's opinion for a majority of the court -- workmanlike and thorough as always -- takes a view of the Mississippi arrangement regulating liquor advertising with which it is hard to disagree violently. Even so, I believe that the better one is expressed in our panel opinions, reported at 701 F.2d 314 and 335. Since it is there set out in great detail, I see no occasion to write further.

For the reasons there expressed, then, I respectfully dissent.

HIGGINBOTHAM, Circuit Judge, concurring in the dissenting opinion:

I join Judge Gee's dissent. I remain convinced that the panel decision was a correct application of the doctrine of commercial speech as developed by the

Supreme Court. I take advantage of the freedom of dissent to add this brief separate statement to express a view I do not see clearly stated elsewhere.

The immediate turn of this case in the long view of constitutional principle has little significance. The case may be little more than how judges view whiskey, or how judges apply their own notions of what is a good and what is a bad law. This intended exaggeration is a sufficiently accurate description of this type of judicial review that we are hesitant to cheerfully admit engaging in it. The point is that the balancing of interests exercise of Virginia Board of Pharmacy and its younger companions reduces the exaggeration to an uncomfortable level.

The efficiency with which a market allocates resources unquestionably depends on a free flow of market information. I had supposed that it was the province of

the Congress and particularly a state legislature to decide whether government ought to weigh into that free exchange; that is, I would not have thought it the role of the courts to quarrel with a state legislature's regulatory pushes and shoves of its own economy.

Nevertheless, the cases instruct that we are to so review and I am reluctant to express my own doubts, which go to the very notion of commercial speech, by applying those cases in a less than faithful way. Doing so substitutes one brand of activism for another.

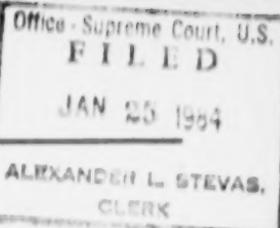
I agree with much of the majority opinion and much of Judge Williams' concurring opinion but I suggest that hesitancy about the type of inquiry provoked by the commercial speech doctrine has affected the weighing of the state's asserted interests. If the First Amendment is a source of protection for the flow of market information to consumers

it is a remarkable draw upon First Amendment jurisprudence that turns that idea into a state's right to keep information pertinent to a lawful transaction from consumers for fear that consumers might misapply it. Of course we are Lochnerizing and intruding into the affairs of a state. I suggest that distaste for the intrusion has created a reluctance in actual application to give full sway to the commercial speech doctrine as developed by the Supreme Court, and was an unidentified hand on the weighing scale of the majority; that it was this added weight which separated the majority and dissenting opinions.

It is hard for me to see that Mississippi has "won" this case. It can ban the advertising of whiskey, true enough, but only because federal judges answerable to no voters have decided that they "agree" with the Mississippi legislature. In the long haul this is no win at all. That

seems to me to be a predictable, if not inevitable, consequence of the doctrine itself. This exaggerates, but it is sufficiently accurate that we ought to be troubled. I am.

88-7944  
NO. \_\_\_\_\_



IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

LAMAR OUTDOOR ADVERTISING, INC. ET AL.,

Petitioners

v.

MISSISSIPPI STATE TAX COMMISSION, ET AL.,

Respondents

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VOLUME 2 OF APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

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APPENDICES - VOL. 1-3  
TABLE OF CONTENTS

	Page
APPENDIX A (VOL. 1) EN BANC OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, OCTOBER 3, 1983 .....	1a
APPENDIX B (VOL. 2) PANEL OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, MARCH 11, 1983 .....	73a
APPENDIX C (VOL. 3) ORDER OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FOR REHEARING EN BANC MARCH 11, 1983 .....	161a
APPENDIX D (VOL. 3) OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION, FEBRUARY 8, 1982 .....	163a
APPENDIX E (VOL. 3) JUDGMENT OF UNITED STATES COURT OF APPEALS ON REHEARING EN BANC OCTOBER 31, 1983 .....	223a
APPENDIX F (VOL. 3) CONSTITUTIONAL PROVISIONS STATUTES, AND REGULATIONS INVOLVED .....	226a

APPENDIX B

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 82-4076

LAMAR OUTDOOR ADVERTISING, INC., et al.,

Plaintiffs-Appellees,

v.

MISSISSIPPI STATE TAX COMMISSION, et al.,

Defendants-Appellants.

March 11, 1983

John E. Milner, W. Timothy Jones,  
Peter M. Stockett, Jr., Asst. Atty. Gen.,  
Jackson, Miss., for defendants-appellants.

Center for Science in the Public  
Interest, Bruce Silverglade, Dir. of Legal  
Affairs, Washington, D.C., for amicus  
curiae.

Gary W. Gardenhire, Asst. Atty. Gen.,  
Chief, Civ. Div., Oklahoma City, Okl., for  
State of Oklahoma.

Peter H. Meyers, Washington, D.C.,  
for Accuracy and Action About Alcohol  
Addiction.

John F. Banzhaf, III, Washington,  
D.C., for Ash.

James K. Child, Jr., Henry E.  
Chatham, Jr., Richard D. Gamblin, Jackson,  
Miss., Jack H. Pittman, Hattiesburg,  
Miss., for plaintiffs-appellees.

Before GOLDBERG, GEE and  
HIGGINBOTHAM, Circuit Judges.

GEE, Circuit Judge:

This case presents the question  
whether certain statutes and regulations  
of the State of Mississippi violate our  
constitutional guarantee of freedom of  
speech because they effectively ban liquor  
advertising on billboards and in printed

and electronic media originating within the state.\*

Appellees are 56 outdoor advertising, newspaper, television and radio businesses that operate in Mississippi. They brought this action against the Mississippi State Tax Commission (the "Commission"), the individual Commissioners thereof, the Commission's Alcoholic Beverage Control Division (the "ABC Division"), and the Attorney General of the State of Mississippi. Each of the defendants is responsible for enforcement of at least part of the Mississippi liquor advertising ban. It was alleged that Mississippi's liquor regulatory scheme prevented appellees from accepting liquor advertising for publication or dis-

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\*In accordance with Court policy, this opinion, being one which initiates a conflict with the rule declared in another circuit, was circulated before release to the entire Court, and rehearing en banc was voted by a majority of the judges in active service.

display within the state, causing them substantial losses of revenue.<sup>1</sup> The appellees sought a declaratory judgment that Mississippi's liquor advertising ban unconstitutionally abridged their commercial speech rights and an injunction against enforcement of the ban. Following a two-day trial, the district court granted appellees' prayers for declaratory and injunctive relief and the state brought this appeal.

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<sup>1</sup>Appellees need not have violated the advertising ban or have been subjected to sanctions in order to have standing to challenge it. Basiardanes v. City of Galveston, 682 F.2d 1203, 1218-19 n. 19 (5th Cir.1982). "Laws restraining First Amendment rights may be challenged by those who allege a desire to engage in the proscribed or regulated activities although they have not yet done so." Id. citing Hynes v. Mayor of Oradell, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976); Beckerman v. City of Tupelo, 664 F.2d 502, 506 (5th Cir.1981). In fact, the record shows that at least some appellee television stations have on occasion violated the ban and received warnings from the ABC Division, though no sanctions were imposed.

Because an understanding of the precise structure of the challenged advertising laws within the wider context of the Mississippi liquor regulatory scheme is necessary to resolve the issues in this case, we begin by describing the elements of Mississippi law in some detail.

I. The Local Option Alcoholic Beverage Control Law.

In 1966, the Mississippi Legislature enacted the Local Option Alcoholic Beverage Control Law (the "Local Option Law"). Miss. Code Ann. §§ 67-1-1 et seq. (1972). This statute strictly regulates manufacture, sale, distribution, possession and transportation in Mississippi of alcoholic beverages except light beers and wines.<sup>2</sup>

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<sup>2</sup>Miss. Code Ann. § 67-1-5(a)(1972) provides:

The words "alcoholic beverage" mean any alcoholic liquid capable of being consumed as a beverage by a human

(Footnote continued)

The Local Option Law allows a county, or a judicial district within a county, to "vote itself out from under" the otherwise state-wide prohibition of liquor maintained by the statute. Miss. Code Ann. §§ 67-1-3; 67-1-7 (1972). If by majority vote of its electors a county or judicial district votes to withdraw from state-wide prohibition, then, subject to the "provisions and restrictions" of the Local Option Law, "possession and transportation" of liquor are legal throughout its jurisdiction. Id. However, the "manufacture, sale and distribution" of liquor is lawful only within incorporated municipalities,

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(Footnote continued)

being, but shall not include wine containing not more than four per cent of alcohol by weight and shall not include beer containing not more than four per cent of alcohol by weight.

We shall use the terms "alcoholic beverages" and "liquor" interchangeably in this opinion to refer to beverages regulated by the Local Option Law.

qualified resort areas, and clubs located within the county or judicial district.

Id. In each county or judicial district, if an election is not held, or if the majority of electors votes against repeal, the Local Option Law continues to enforce strict prohibition within that jurisdiction: manufacture, sale and distribution of liquor, as well as possession or transportation, are banned completely. Id.

Miss. Code Ann. § 67-1-17 (1972).

At the time of trial, thirty-five "dry" counties and four judicial districts in other counties had not voted to legalize liquor. Forty-three "wet" counties and four judicial districts in other counties had voted to repeal prohibition to the extent permitted by the Local Option Law. Wet and dry jurisdictions are distributed randomly throughout the state. According to the testimony of the Director of the ABC Division, a majority of

Mississippi's population resides in wet counties.<sup>3</sup>

Mississippi's liquor regulatory scheme incorporates several statutory provisions and regulations affecting advertisement of alcoholic beverages, all of which are challenged by the appellees. Section 97-31-1, enacted in 1916, completely bans all liquor advertising in the state. This provision is part of the "Intoxicating Beverages Offences" chapter of the Mississippi Code, which comprises Mississippi's pre-local option statutes that enforced complete prohibition of liquor in the state. Miss. Code Ann. §§ 97-31-1 et seq. (1972). The subsequently-enacted Local Option Law

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<sup>3</sup>"Real Mississippians (sic) know which counties are wet and which are dry and they know where to buy liquor in all of them." Rogers, Real Mississippians Stand When Car Horn Plays "Dixie", Jackson Clarion Ledger-Daily News, Nov. 27, 1982, at 1.

incorporated the Intoxicating Beverages Offences by reference, repealing "[a]ll laws and parts of laws in conflict with [the Local Option Law] only to the extent of such conflict." Miss.Code Ann.

§ 67-1-3(1972). As we shall see, the advertising ban of the Local Option Law applies only to advertisements originating within Mississippi. Accordingly, since Section 97-31-1 is more extensive than the Local Option Law and must be read in pari materia with it, the scope of its advertising ban is limited to that of the Local Option Law as discussed below.\*

The principal provisions challenged in this case are Miss.Code Ann.

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\*Violation of Section 97-31-1 is punishable by a fine of up to \$500 and imprisonment up to six months. Miss.Code Ann. § 97-31-3 (1972). Injunctive intervention is also available and may be sought by the state attorney general, district or county attorney, or a citizen. Id.

§ 67-1-37(e)(1972) and its attendant regulation, Regulation No.6. Section 67-1-37(e) provides:

The state tax commission, under its duties and powers with respect to the alcoholic beverage control division therein, shall have the following powers, functions and duties:

(e) To issue rules prohibiting the advertising of alcoholic beverages in the state in any class of media and to provide further that all advertising of the retail price of alcoholic beverages shall be prohibited except on placards or signs in the interior of licensed premises which are not visible from the exterior.

Pursuant to this statutory authority, the ABC Division has issued its Regulation No. 6:

No person, firm or corporation shall originate advertisement in this State dealing with alcoholic beverages by any means whatsoever, including but not limited to newspapers, radio, television, circular, dodger, word of mouth, signs, billboards, displays or any other advertising media...  
(emphasis added).

Regulation No. 6 provides exceptions for certain limited types of advertising. Each retail package store may erect a sign on its premises that states the name of

the business, its ABC Division permit number, and the legend "Package Liquor Sold Here." The size of the lettering and location of the sign are specified. Retail package dealers may also maintain advertising displays inside their places of business so long as they are not placed in windows and do not attract attention from outside the building. In addition, the word "lounge" may be used on signs and in other forms of advertising to identify establishments holding permits to sell liquor for on-premises consumption. No other words suggesting that liquor is sold, such as "cocktails" or "bar," may be used. Regulation No. 6 further provides that all advertising not specifically permitted by statute or regulation is prohibited. Finally, the Regulation provides that advertising of doubtful legality may be submitted to the Commission for approval prior to publication.

Appellees also challenge Section 67-1-85 of the Local Option Law which, like Regulation No. 6, prohibits liquor advertising on billboards. Miss.Code Ann. § 67-1-85 (1972). This provision was amended by House Bill No. 905 in the 1982 session of the Mississippi Legislature to allow billboard advertising, except as to price, of native wines -- wines produced principally from fruit grown in Mississippi -- by Mississippi wineries. Miss.Code Ann. §§ 67-1-85, 67-1-5(q), 67-5-5 (Supp.1982). All other billboard advertising of alcoholic beverages remains prohibited.<sup>5</sup>

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<sup>5</sup>Appellees also have attacked certain remedial provisions of the Local Option statute and regulations to the extent that they are used to enforce the challenged substantive provisions. Miss.Code Ann. § 67-1-87 (1972), the general penalty provision of the Local Option Law, provides:

Any person convicted of a violation of any of the provisions of this

(Footnote continued)

According to the testimony of Mr. L.R. Mashburn, the ABC Division's Chief of Enforcement, the policy of the ABC Division, consistent with the language of Regulation No. 6, is not to enforce the

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(Footnote continued)

chapter for which no other penalty is specifically provided herein, shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars (\$1,000.00), or by imprisonment for not more than six months, or by both such fine and imprisonment.

Pursuant to its rulemaking authority, the ABC Division has promulgated Regulation No. 1 and Regulation No. 36. Regulation No. 1 provides that any person who violates any provision of the Local Option Law shall not be eligible to obtain any of the permits provided under that statute. Regulation No. 36 authorizes the Commission, which is the exclusive wholesaler of liquor in Mississippi, to remove any brand from its approved list whenever, in its discretion, "the best interest of the [ABC] Division may be served." The Commission has on occasion "delisted" brands that were illegally advertised. See Pretrial Order at 10-11.

Having found the challenged substantive provisions unconstitutional, the district court enjoined enforcement of Section 67-1-87 and Regulation Nos. 1 and 36 insofar as they are applied to enforce Mississippi's laws banning intrastate liquor advertising.

state's liquor advertising ban against anyone who does not "originate advertisement" of liquor within Mississippi. Mr. Mashburn further testified that the ABC Division has interpreted the phrase "originate advertisement in this State" to mean that the central place of publication or dissemination of the liquor advertisements must be within the physical boundaries of Mississippi. The state's policy is based upon a perceived lack of jurisdiction over out-of-state advertisers and is derived in part from two 1967 Opinions of the Attorney General of Mississippi.<sup>6</sup> In his opinion dated March 29, 1967, the Attorney General stated that Mississippi had no control over liquor advertisements

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<sup>6</sup>The extent of Mississippi's jurisdiction over out-of-state advertising businesses is not an issue in this case. Accordingly, we express no opinion on whether the state's view as to the extent of its jurisdiction is correct.

in a magazine printed in another state and mailed into Mississippi. Later, on May 19, 1967, the Attorney General opined that "there would be no violation of our advertising law" if a magazine containing liquor advertisements were printed in Mississippi, shipped to Louisiana, and mailed for distribution from that state.

Mr. Mashburn testified that the state enforced its advertising ban against newspapers and magazines published in Mississippi and that the state considered itself without jurisdiction to ban advertisements in publications published in other states and circulated in Mississippi. Similarly, the state attempts to enforce its rules only against outdoor advertising physically located within its borders. Television and radio broadcasters physically located within the state are prohibited from carrying liquor advertisements. However, because of the perceived lack of jurisdiction, this prohibition is not

applied to those who broadcast such advertisements into Mississippi from stations and transmitters located in other states.

As this discussion makes clear, Mississippi statutes and regulations, as authoritatively interpreted by its Attorney General and ABC Division, effect a virtually complete ban of liquor advertising by intrastate media. Aside from de minimis exceptions for native winery billboards and advertising identifying the existence of a "lounge," no alcoholic beverage advertising may be displayed by any outdoor advertiser, newspaper, magazine, television station or radio station located within the borders of Mississippi. These restrictions do not apply to advertising displays inside package liquor stores or to printed or broadcast advertising directed into Mississippi by out-of-state media businesses. We are called upon to decide if a virtual prohibition of liquor advertising in intrastate media is within

the power of a state to enact, or whether it impermissibly trammels the First and Fourteenth Amendment rights of appellees to disseminate commercial speech.

II. Does First Amendment Protection of Commercial Speech Extend to Liquor Advertising by Mississippi Media Businesses?

If liquor advertising is to be accorded any protection by the First Amendment, appellees concede that it must qualify as protected commercial speech under Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) and its progeny. No contention is made that such advertising merits protection owing to any political or expressive elements it might contain. Indeed, liquor advertising is a paradigm of purely commercial speech. It is speech which does "no more than propose a commercial transaction," Virginia Pharmacy,

supra, 425 U.S. at 762, 96 S.Ct. at 1825, 48 L.Ed.2d at 358, and which is "related solely to the economic interests of the speaker and its audience." Central Hudson Gas & Elec. Corp. v. Public Service Commission, 447 U.S. 557, 561, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341, 348 (1980).<sup>7</sup>

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'Typically, the right to disseminate commercial speech has been asserted by those who seek to use it to promote their goods or services, see e.g. Central Hudson, supra; Friedman v. Rodgers, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979); Bates v. State Bar, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); or by those who seek to benefit as recipients of the information. Virginia Pharmacy, supra, 425 U.S. at 756-57, 96 S.Ct. at 1823, 48 L.Ed.2d at 355; see also United States Postal Service v. Athena Products, Ltd., 654 F.2d 362, 366 (5th Cir.1981), cert. denied, 456 U.S. 915, 102 S.Ct. 1768, 72 L.Ed.2d 173 (1982). In the case before us, the right to engage in commercial speech is asserted not by the speaker or members of his audience, but by those media businesses that relay the commercial speech from speaker to hearer for a fee. Recently, the Supreme Court implicitly recognized that such parties have a right to disseminate protected commercial speech and standing to enforce that right when it allowed several outdoor

(Footnote continued)

[1] The determination that speech which a state has attempted to regulate or prohibit is commercial speech gives rise to a complex inquiry. Not all commercial speech enjoys First Amendment protection. Central Hudson, supra, 447 U.S. at 566, 100 S.Ct. at 2351, 65 L.Ed.2d at 351. Moreover, commercial speech that does lie within the First Amendment's scope may be subjected to greater governmental regulation than other forms of speech such as political expression. Virginia Pharmacy, supra, 425 U.S. at 771-72 n. 24, 96 S.Ct.

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(Footnote continued)

advertising businesses to challenge a billboard ban and applied customary commercial speech analysis to their claims. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (plurality opinion, joined on this issue by Stevens, J.). Moreover, the Supreme Court has recognized that application of an advertising prohibition against a publisher and editor, and not against the advertiser, incurs "more serious First Amendment overtones." Bigelow v. Virginia, 421 U.S. 809, 828, 95 S.Ct. 2222, 2236, 44 L.Ed.2d 600, 615 (1975).

1830-31 n. 24, 48 L.Ed.2d at 364 n. 24.

In this section, we address the state's first argument that the liquor advertising which appellees propose to disseminate is not protected commercial speech. Because we ultimately conclude that appellees' advertising is protected, we must next consider the state's argument that even if protected, liquor advertising may be subjected to the regulations Mississippi has chosen to enact. That issue is considered in Part IV below.

In a summary of its analysis of commercial speech cases, the Supreme Court stated the threshold question:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.

Central Hudson, supra, 447 U.S. at 566, 100 S.Ct. at 2351, 65 L.Ed.2d at 351. The state argues that liquor advertising in Mississippi is not protected commercial

speech for three reasons. It asserts that such advertising will fail the lawful activity test and that it is inherently misleading. The state also contends that advertising of "hazardous products" is not protected by the First Amendment. We will consider each argument in turn.

Mississippi's argument that liquor advertising will fail the unlawful activity test is based upon the structure of the Local Option Law which makes the sale, transportation and possession of liquor completely illegal in large portions of the state. Relying upon dicta in several Supreme Court commercial speech cases, the state argues that in order for liquor advertisements to merit First Amendment protection, the activities promoted by the advertising must be legal everywhere in Mississippi. In Central Hudson, the Supreme Court stated that states may ban commercial speech "related to illegal activity." 447 U.S. at 564,

100 S.Ct. at 2350, 65 L.Ed.2d at 349.

Conversely, in Virginia Pharmacy, the Court struck down a ban on advertising of prescription drug prices, the sale of which it characterized as an "entirely lawful activity." 425 U.S. at 773, 96 S.Ct. at 1831, 48 L.Ed.2d at 365.

Mississippi argues that because sale or possession of alcoholic beverages are not "entirely lawful" activities throughout the state, advertising of liquor is "related to illegal activity" and is therefore not protected commercial speech. This facially plausible reasoning tracks the language, but not the sense, of the cases.

The font of the lawful activity requirement for commercial speech protection is Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973).

There, the City of Pittsburgh had enacted an ordinance prohibiting both sex

discrimination in employment and an employer's utilization of advertisements indicating such discrimination. Pittsburgh Press was found to have violated a companion provision that forbade any person to aid an employer to violate the ordinance. Pittsburgh Press had published help-wanted advertisements in sex-designated columns. The Supreme Court affirmed an order that Pittsburgh Press cease and desist from publishing sex-classified job advertisements, rejecting its claims that the ordinance and order violated its First Amendment rights.

Pittsburgh Press was decided before the genesis of constitutional protection of commercial speech; at that time, commercial speech was treated as wholly outside the ambit of the First Amendment.\*

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\*Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942).  
(Footnote continued)

One of the arguments made by Pittsburgh Press was that the distinction between commercial and other speech should be abrogated and that commercial speech should be afforded full First Amendment protection. Justice Powell responded as follows:

Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is illegal commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned "Narcotics for Sale" and "Prostitutes Wanted" rather than stated within the four corners of the advertisement.

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(Footnote continued)

For an excellent discussion of the development and subsequent demise in the Supreme Court of the Chrestensen theory of unprotected commercial speech, see Comment, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U.Chi.L.Rev. 205, 207-22 (1976).

The illegality in this case may be less overt, but we see no difference in principle here.

\* \* \*

The advertisements, as embroidered by their placement, signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions. Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

413 U.S. at 388-89, 93 S.Ct. at 2560-61 (footnote omitted; emphasis original). Simply put, the Court determined that even if commercial speech were protected, advertising that proposed a transaction illegal in itself would not be. Cf. Brown v. Hartlage, 456 U.S. 45, 102 S.Ct. 1523, 1530, 71 L.Ed.2d 732 (1982) (solicitation which is "an invitation to engage in an illegal exchange for private profit" may be prohibited).

Later, when appropriate cases arose, the Supreme Court recognized that the First Amendment protects commercial speech and incorporated the Pittsburgh Press illegal activity distinction in its formulation of a framework for commercial speech analysis. Virginia Pharmacy, supra; Central Hudson, supra. Because the cases that developed this framework did not actually involve claims that the advertising in question was related to an illegal activity, the language relied upon by the state must be understood as merely a reaffirmation of the principle of Pittsburgh Press. Thus, when the Supreme Court spoke in Virginia Pharmacy of protection for information about an "entirely lawful activity" it emphasized that "there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way." 425 U.S. at 772, 96 S.Ct. at 365 (emphasis added) (citing Pittsburgh

Press, supra); see also Carey v. Population Services International, 431 U.S. 678, 700, 97 S.Ct. 2010, 2024, 52 L.Ed.2d 675, 694 (1977).

[2] Application of these principles to the present case indicates that it is incorrect to assert that liquor must be "entirely lawful" everywhere in Mississippi before First Amendment protection attaches to its advertising. The proper focus under Pittsburgh Press is upon the legality of the transaction proposed by the advertising, not upon the geographical extent of the advertised product's legal availability. As in Virginia Pharmacy, and unlike Pittsburgh Press, there is no claim in this case that the appellees liquor advertisements will propose an illegal transaction -- i.e. an unlawful sale or purchase of liquor. On the contrary, the parties apparently assume that these transactions will occur in

"wet" counties. Accordingly, Mississippi's first argument must fail.

Although we have concluded that the state's selected language from Central Hudson and Virginia Pharmacy cannot carry the freight it seeks to load on it, a recent decision raises a more serious question as to the protected status of liquor advertising in Mississippi. As we have explained, Pittsburgh Press and its progeny developed a narrow category of unprotected commercial speech consisting of advertising that proposes illegal transactions. In Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982), the Supreme Court expanded that category to encompass commercial speech "promoting or encouraging" an illegal activity even though the immediate transaction touted by the speech was itself legal. We therefore must decide whether within the context of Mississippi's

local option scheme, liquor advertising improperly promotes or encourages illegal activity and is thereby deprived of First Amendment protection.

In Flipside, the plaintiffs attacked an ordinance that made it unlawful "to sell any items, effects, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs ... without obtaining a license therefor." In response to the claim that this ordinance abridged the plaintiffs' commercial speech rights, Justice Marshall wrote for a unanimous Court:

[I]nsofar as any commercial speech interest is implicated here, it is only the attenuated interest in displaying and marketing merchandise in the manner that the retailer desires. We doubt that the village's restriction on the manner of marketing appreciably limits Flipside's communication of information -- with one obvious and telling exception. The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed "speech," then it is speech proposing an illegal transaction, which a government may regulate or ban entirely.

455 U.S. at 496, 102 S.Ct. at 1192, 71 L.Ed.2d at 370 (emphasis original; citing Central Hudson, supra, 447 U.S. at 563-64, 100 S.Ct. at 2320; Pittsburgh Press, supra, 413 U.S. at 388, 93 S.Ct. at 2560). Though it is broader than that of Pittsburgh Press, we do not regard the principle announced in Flipside as broad enough to exclude all Mississippi liquor advertising from the First Amendment.

The statute in Flipside was narrowly drawn and "expressly directed at commercial activity promoting or encouraging illegal drug use." Id. Significantly, it incorporated a scienter requirement; its "marketed for use" standard "describes a retailer's intentional display and marketing of merchandise" in a way that encourages illegal drug use. Id., 455 U.S. at 502, 102 S.Ct. at 1195, 71 L.Ed.2d at 374. Thus, it is clear that the court in Flipside excluded from First Amendment protection only such commercial speech as

actively and intentionally promotes or encourages illegal activity. See Tobacco Accessories and Novelty Craftsmen

Merchants Ass'n v. Treen, 681 F.2d 378, 382 (5th Cir.1982) (no commercial speech right to display drug paraphernalia knowing its drug-related nature when paraphernalia itself is illegal).

[3] We are asked to take judicial notice of the fact that liquor advertising will encourage activity unlawful in Mississippi.' Even assuming that sales and purchases will occur legally in wet counties, it is argued that advertising will induce Mississippi consumers to transport, possess, and consume alcoholic beverages in counties where those acts are illegal. We need not decide whether judi-

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<sup>1</sup>Judicial notice of this fact was taken by Chief Judge Keady in Dunagin v. City of Oxford, 489 F.Supp. 763 (N.D.Miss.1980), an appeal we also decide today. 701 F.2d 335 (5th Cir.1983).

cial notice is proper in this situation because even if we assume that some consumers are bound to engage in illegal acts based upon information received from liquor advertising, we cannot conclude that such speech is therefore outside the scope of the First Amendment. By contrast to the statute in Flipside, the Mississippi regulatory scheme is not directed at commercial speech that by its terms intentionally or actively promotes illegal activity. Mississippi does not ban only advertising that promotes or encourages violation of the Local Option Law; rather it prohibits all intrastate liquor advertising. No claim has been made, nor could one have been made, that all liquor advertising actively promotes illegal activity. We must therefore conclude that Mississippi has prohibited protected commercial speech.

[4] We believe that the policies underlying First Amendment protection of commercial speech require that the

"unlawful activity" exception be limited to those categories of commercial speech already identified by the Supreme Court -- those that propose a transaction illegal in itself, or actively promote illegal activity. The First Amendment value of commercial speech derives from its informational function. Central Hudson, supra, 447 U.S. at 561-64, 100 S.Ct. at 2349-50, 65 L.Ed.2d at 348-49; United States Postal Service v. Athena Products, Ltd., 654 F.2d 362, 367 (5th Cir. 1981), cert. denied, 456 U.S. 915, 102 S.Ct. 1768, 72 L.Ed.2d 173 (1982). In order to guard society's interest in "the fullest possible dissemination of information," Central Hudson, supra, 447 U.S. at 561-62, 100 S.Ct. at 2349, 65 L.Ed.2d at 348, the Constitution forbids the government to pursue its objectives "by keeping the public in ignorance." Virginia Pharmacy, supra, 425 U.S. at 770, 96 S.Ct. at 1829, 48 L.Ed.2d at 363. This limitation on

governmental action traditionally has lain at the heart of First Amendment jurisprudence. Outside the commercial speech context, the government may not suppress speech because of the effect it may have on the actions of the public unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1969). This standard also has been applied to commercial speech related to an "activity with which, at least in some respects, the State could not interfere." Carey v. Population Services International, 431 U.S. 678, 701, 97 S.Ct. 2010, 2024, 52 L.Ed.2d at 675 (1977) (contraceptives) (quoting Virginia Pharmacy, supra, 425 U.S. at 760, 96 S.Ct. at 1825, 48 L.Ed.2d at 357).

Where purely commercial speech is concerned, the nexus between speech and illegal conduct need not be so immediately;

incitement has not been required. Flipside, supra. The public interest in the free flow of commercial information, a particularly hardy breed of expression, Virginia Pharmacy, supra, 425 U.S. at 771-72 n. 24, 96 S.Ct. at 1830-31 n. 24, 48 L.Ed.2d at 364 n. 24, will not be imperiled if speech actively promoting illegal action, which falls short of incitement, is unprotected. We must conclude, however, that the First Amendment guarantee of freely flowing channels of information would be seriously eroded if information could be deprived of constitutional protection whenever a state could conclude that some people might independently choose to act on it in an unlawful manner.<sup>10</sup> The possibility of unilateral illegal acts by his audience

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<sup>10</sup>In Virginia Pharmacy, the Supreme Court refused to uphold a ban on advertising of prescription drugs based upon an assumption that advertising might (Footnote continued)

should not deprive a speaker's words of constitutional protection unless his words are directed toward producing the unlawful response. Mississippi may not ban all liquor advertising in intrastate media

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(Footnote continued)

induce illegal dispensation of drugs: "We do not assume ... that simply because low prices will be freely advertised, physicians will overprescribe, or that pharmacists will ignore the prescription requirement." 425 U.S. at 766 n. 21, 96 S.Ct. at 1828 n. 21, 48 L.Ed.2d at 361 n. 21. Similarly, as in the present case, there is always a possibility that consumers may use lawfully obtained prescription drugs in an unlawful manner. Nevertheless, drug advertising was accorded First Amendment protection. See id., 425 U.S. at 787-90, 96 S.Ct. at 1838-39, 48 L.Ed.2d at 374-75 (Rehnquist, J., dissenting)39 ("The very real dangers that general advertising for such drugs might create in terms of encouraging [by increasing demand], even though not sanctioning, illicit use of them by individuals for whom they have not been prescribed, or by generating patient pressure upon physicians to prescribe them, are simply not dealt with in the Court's opinion."). See also Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) (advertising of abortions, a highly regulated service that is illegal in certain circumstances, is protected).

because some of its citizens may choose to use alcoholic beverages illegally.

Mississippi next argues that liquor advertising is not entitled to First Amendment protection because it is "generically misleading." See Central Hudson, supra, 447 U.S. at 566, 100 S.Ct. at 2351, 65 L.Ed.2d at 351 ("For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading."). The state asserts that advertising will necessarily portray liquor consumption as appealing, fashionable and a badge of the "good life." It is argued that such advertising is misleading in two ways. First, the state asserts that because liquor consumption is hazardous to health, it is not a desirable activity and favorable representations are therefore simply false. Second, it contends that because this presentation omits information about the potentially harmful effects of alcohol

consumption, it is incomplete and inherently misleading. These arguments are not persuasive.

Mississippi's first argument apparently assumes that this court may determine as a matter of law that all liquor consumption is "bad" and that representations that it is "good" are therefore false or misleading. Those are subjective determinations that we are neither equipped nor empowered to make as a matter of constitutional law. The second argument, while more plausible, does not carry the state as far as it would like.

[5] The evidence in this case establishes that liquor consumption, and especially its abuse, entails many potentially harmful physical effects. To the extent that liquor advertising omits these facts, the information conveyed is incomplete and a potential exists that some will be misled. However, Mississippi goes too far when it claims that this deprives the

advertising of all constitutional protection. "Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all." Central Hudson, supra, 447 U.S. at 562, 100 S.Ct. at 2349, 65 L.Ed.2d at 348. Although the government clearly has the power to correct misleading omissions, "the preferred remedy is more disclosure, rather than less." Bates, supra, 433 U.S. at 375, 97 S.Ct. at 2704-05, 53 L.Ed.2d at 830; In the Matter of R. M.J., Appellant, 455 U.S. 191, 200-02, 102 S.Ct. 929, 936-37, 71 L.Ed.2d 64, 73 (1982); Better Business Bureau v. Medical Directors, Inc., 681 F.2d 397, 405 (5th Cir.1982). "[T]he states may not place an absolute prohibition on certain types of potentially misleading information ... if the information also may be presented in a way that is not deceptive." R. M.J.,

supra, 455 U.S. at 203, 102 S.Ct. at 937, 71 L.Ed.2d at 74; Medical Directors, supra, 681 F.2d at 405. Thus, where an advertisement had the potential to mislead by implying that the Better Business Bureau had endorsed the advertiser's services, we held that a prominent disclaimer of the Bureau's endorsement was the appropriate response. Medical Directors, supra, 681 F.2d at 405; see also Bates, supra, 433 U.S. at 384, 97 S.Ct. at 2709, 53 L.Ed.2d at 836; R. M.J., supra, 455 U.S. at 199-203, 102 S.Ct. at 935-937, 71 L.Ed.2d at 72-74. The Supreme Court also has suggested that the prohibition against prior restraints may be inapplicable to attempts to regulate misleading commercial speech. Virginia Pharmacy, supra, 425 U.S. at 771-72 n. 24, 96 S.Ct. at 1830-31 n. 24, 48 L.Ed.2d at 364 n. 24; Athena Products, supra, 654 F.2d at 367. Time, place, and manner restrictions also have been approved as methods of

preventing misleading commercial speech. See generally Virginia Pharmacy, supra, 425 U.S. at 770-71, 96 S.Ct. at 1829-30, 48 L.Ed.2d at 363-64. These decisions convince us that any potential to mislead that liquor advertising may possess should be addressed within the framework of permissible regulation of commercial speech; these concerns do not warrant wholesale exclusion of liquor advertising from First Amendment protection.

Finally Mississippi contends that in addition to the exceptions for advertising of unlawful activities and misleading advertising, the Supreme Court has refused to accord any First Amendment protection to commercial speech that advertises a product that is "hazardous beyond controversy." This argument is meritless; there is no "hazardous product" exception to the First Amendment nor could there well be without destroying the commercial speech doctrine. Many if not most products have

hazardous potential; ropes, automobiles and shotguns are familiar examples.

In support of this argument, appellants rely principally<sup>11</sup> on Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582 (D.D.C.1971) (three-judge court), aff'd mem. 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972). The three-judge district court in that case upheld a nationwide ban of cigarette advertising on television and radio:

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<sup>11</sup>Other cases relied upon for this proposition, rather than creating an exception for hazardous product advertising, treat such advertising as prima facie within the First Amendment and apply the standard of review developed for commercial speech. Regulations prohibiting certain types of advertising in order to avoid perceived hazards have been upheld in these cases because they pass muster under this test, not because such advertising is wholly unprotected. See e.g., Metromedia, supra (billboards); Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979) (trade names by optometrists); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 454-55, 98 S.Ct. 1912, 1917-18, 56 L.Ed.2d 444 (1978) (in-person solicitation).

Whether the Act is viewed as an exercise of the Congress' supervisory role over the federal regulatory agencies or as an exercise of its power to regulate interstate commerce, Congress has the power to prohibit the advertising of cigarettes in any media.

Id. at 584. The state's claim that this case establishes a "hazardous product" exception to the First Amendment completely disregards the court's stated basis for its decision. Capital Broadcasting was decided before the Supreme Court had accorded any significant First Amendment protection to commercial speech:

[I]t is dispositive that the Act has no substantial effect on the exercise of petitioners' First Amendment rights. Even assuming that loss of revenue from cigarette advertisements affects petitioners with sufficient First Amendment interest, petitioners, themselves, have lost no right to speak -- they have only lost an ability to collect revenue from others for broadcasting their commercial messages. Finding nothing in the Act or its legislative history which precludes a broadcast licensee from airing its own point of view on any aspect of the cigarette smoking question, it is clear that petitioners' speech is not at issue. Thus, contrary to the assertions made by petitioners, Section 6 does not

prohibit them from disseminating information about cigarettes, and therefore, does not conflict with the exercise of their First Amendment rights.

Id. (citation omitted). This discussion clearly establishes that the court's decision was based upon its now-rejected view of the unprotected First Amendment status of advertising in general, and the rights of commercial broadcasters in particular, not upon any exception for advertising of "hazardous products." See note 7, supra; J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 778 (1978); see also Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 92 n. 6, 97 S.Ct. 1614, 1618 n. 6, 52 L.Ed.2d 155, 161 n. 6 (1977) ("After Virginia Pharmacy Bd. it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental'."))

### III. The Appropriate Standard of Review.

[6] Having decided that liquor advertising does not wholly lack First Amendment protection, we must now decide whether the First Amendment precludes the specific restrictions on commercial speech challenged here. This task entails an exercise that is common in constitutional adjudication: the Mississippi regulatory scheme must be evaluated in light of the appropriate standard of review. In an ordinary commercial speech case the appropriate standard of review is clear: a regulation of protected commercial speech is valid only if it directly advances a substantial governmental interest and is not more extensive than necessary to serve that interest. Central Hudson, supra, 447 U.S. at 566-67, 100 S.Ct. at 2351-52, 65 L.Ed.2d at 351. Mississippi vigorously contends, however, that this is not an ordinary commercial speech case. It

argues that the Twenty-first Amendment<sup>12</sup> has bestowed enhanced police power upon Mississippi in the area of liquor regulation and that laws enacted by virtue of that power are valid if they rationally further a legitimate state purpose. This "rational basis" test espoused by the state is much more deferential to state legislative judgments than the intermediate level of scrutiny required by Central Hudson. Therefore, before we can consider the validity of the Mississippi liquor advertising law, we must decide which of the various standards of review should be applied. This is not a simple inquiry, nor is the answer unequivocally indicated by either our cases or those of

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<sup>12</sup>Section II of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited."

the Supreme Court. Indeed, upon initial examination, the two lines of relevant Supreme Court precedent seem to clash. However, after careful consideration of the Constitution and the cases, we have concluded that Mississippi law must pass muster under Central Hudson if the First Amendment rights of appellees are to be adequately vindicated.

To support the position that rational basis scrutiny is appropriate in this case, Mississippi relies upon California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) and New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981), the only cases in which the Supreme Court has directly addressed the interaction of the First and Twenty-first Amendments. In each of these cases, the Court employed the highly deferential standard of review espoused by appellants and rejected First Amendment attacks upon

certain state liquor regulations. In response to the argument of the state, appellees point to another line of cases in which the Supreme Court has refused to dilute its customary standard of review for statutes impinging upon individual rights even though the statutes were manifestations of a state's Twenty-first Amendment power. E.g. Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

In California v. LaRue, supra, the plaintiffs attacked on First Amendment grounds the rules of the California Alcoholic Beverage Control Department regulating the type of entertainment permitted in bars and night clubs that it licensed under state law. These rules prohibited in quite specific terms the performance of various actual or simulated sexual acts on licensed premises. Also prohibited was

the display of films or pictures depicting such acts. The plaintiffs contended that these rules prohibited some forms of constitutionally protected expressive conduct and were thus facially unconstitutional. Although the Supreme Court agreed that at least some of the proscribed performances were protected,<sup>13</sup> nevertheless it sustained the validity of the rules.

Justice Rehnquist's opinion for the Court cited two interdependent reasons for this decision. First, the Court observed that the specific grant of authority in the Twenty-first Amendment has traditionally been recognized as conferring on the

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<sup>13</sup>The Court conceded that the rules would reach some presentations that would not be found obscene under Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), and that could not be prohibited under the standards governing certain expressive conduct established in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). LaRue, supra, 409 U.S. at 116-17, 93 S.Ct. at 396-97, 34 L.Ed.2d at 351.

states something more than normal police power within its area of concern. While recognizing that the Twenty-first Amendment has never been read to supersede other constitutional provisions, the Court observed that "the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment." 409 U.S. at 115, 93 S.Ct. at 395, 34 L.Ed.2d at 350. Second, the Court noted that the states' power to regulate expression significantly increases when such expression consists in part of "conduct" or "action."<sup>14</sup> In this connection, the Court emphasized the findings of the California ABC Division after public

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<sup>14</sup> 409 U.S. at 117, 93 S.Ct. at 396, 34 L.Ed.2d at 351 (citing Hughes v. Superior Court, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985 (1950); Giboney v. Empire Storage Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949)).

hearings that the proscribed sexual conduct, when performed in establishments where liquor was served, gave rise to increased sexually-related crimes and violence in the area.<sup>11</sup>

Based upon these two factors -- an "added presumption [of] validity" in the Twenty-first Amendment area, 409 U.S. at 118, 93 S.Ct. at 397, 34 L.Ed.2d at 352, and the additional power of the state to regulate expression that is also conduct -- the Supreme Court applied a deferential standard of review to the California regulation. Because "[t]he Department's conclusion ... that certain sexual

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<sup>11</sup>409 U.S. at 111-12, 115-16, 93 S.Ct. at 395-96, 34 L.Ed.2d at 348, 350. The Supreme Court has continued to recognize that expression relating to sexual conduct may be restricted in some locations in order to avoid its undesirable collateral effects. See e.g. Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (zoning of "adult" theaters to prevent urban blight).

performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one," the regulations were upheld. Id. In so holding, the Court emphasized that California's rules directly regulated only the dispensation of liquor; expression was affected only incidentally:

[T]he critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.

Id. In New York State Liquor Authority v. Bellanca, supra, the Supreme Court extended the holding of LaRue beyond regulation of acts of "gross sexuality" to uphold a prohibition of topless dancing in establishments licensed to serve liquor. Id., 452 U.S. at 717, 101 S.Ct. at 2601, 69 L.Ed.2d at 361.

Mississippi argues that LaRue and Bellanca, the only Supreme Court cases involving First Amendment challenges to

liquor regulations, require application of rational basis scrutiny to Mississippi's liquor advertising law. We do not believe, however, that those cases go so far as to establish the broad proposition that any state law arguably proceeding from the state's Twenty-first Amendment power is entitled to so much judicial deference. Moreover, crucial differences between the regulations approved in LaRue and Bellanca and the Mississippi advertising law convinces us that we should take a closer look at the state law in this case.

As we have seen a "critical fact" for the LaRue Court was that the state had not totally prohibited the plaintiff's expressive conduct. 409 U.S. at 118, 93 S.Ct. at 397, 34 L.Ed.2d at 352. It had merely prohibited performances in establishments that it licensed to serve liquor. Put another way, the state regulation was directed at the dispensation of liquor,

not at the suppression of expression.<sup>16</sup>

The plaintiffs' expressive activity was affected only incidentally by the state's refusal to allow liquor to be served contemporaneously.<sup>17</sup>

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<sup>16</sup> See California v. LaRue, 409 U.S. at 119-20, 93 S.Ct. at 398, 34 L.Ed.2d at 353 (Stewart, J., concurring):

Every State is prohibited by [the First and Fourteenth] Amendments from invading the freedom of the press and from impinging upon the free exercise of religion. But does this mean that a State cannot provide that liquor shall not be sold in bookstores, or within 200 feet of a church? I think not. For the State would not thereby be interfering with the First Amendment activities of the church or the First Amendment business of the bookstore. It would simply be controlling the distribution of liquor, as it has every right to do under the Twenty-first Amendment.

<sup>17</sup> This distinction was reiterated in Bellanca, where the Court compared the regulations in that case and LaRue with an ordinance disapproved by the Court in Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

Bellanca, supra, 452 U.S. 716, 101 S.Ct. at 2600, 69 L.Ed.2d at 360. The Salem Inn ordinance prohibited females from appearing topless, not only in bars, but

(Footnote continued)

[7] In contrast, the Mississippi liquor advertising regulations are directly aimed at appellees' constitutionally protected commercial speech. They are not regulations of liquor dispensation that incidentally burden expression. In addition, unlike the rules in LaRue and Bellanca, the Mississippi advertising laws impose a virtually absolute ban upon appellees' expression; no alternative forums are open to Mississippi media

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(Footnote continued)  
in "any public place." Id. The Supreme Court held that the district court had not abused its discretion in ruling that the Salem Inn plaintiffs were likely to prevail on the merits of their First Amendment claim and therefore in granting a preliminary injunction. 422 U.S. at 931-34, 95 S.Ct. at 2567-69. Although the standard of review in a preliminary injunction context is less exacting than in a subsequent review of the merits, id. at 931-32, 95 S.Ct. at 2567-68, Salem Inn reinforces our conviction that laws directly regulating liquor, which may also incidentally burden expression, are on a different constitutional footing than laws that directly and comprehensively prohibit the expressive activity itself.

businesses.<sup>18</sup> As the Supreme Court stated in Central Hudson,

We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.

447 U.S. at 566 n. 9, 100 S.Ct. at 2351 n. 9, 65 L.Ed.2d at 351 n. 9 (citation omitted).

Because the Mississippi advertising scheme directly prohibits speech that lies within the ambit of the First Amendment, we would be reluctant to review it under a deferential standard developed for liquor

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<sup>18</sup>Appellees are permitted by Regulation No. 6 to identify a "lounge" in their advertisements. On-premises advertising is also permitted in retail liquor stores, but by definition, the appellee media businesses cannot utilize this medium.

regulations that only incidentally burden some protected expression, even if LaRue and Bellanca were the Supreme Court's only relevant pronouncements, which they are not. The absolute language of the First Amendment has always been though to require stricter scrutiny. We cannot read the terms of the Twenty-first Amendment, which expressly grants regulatory authority over only liquor itself, to grant similarly broad power to regulate other things whenever liquor may be involved. As will be shown, a significant line of cases supports this view. In them, state laws passed pursuant to Twenty-first Amendment power were alleged to have abridged Constitutional guarantees made applicable to the states by the Fourteenth Amendment; the Supreme Court held that neither the scope of the constitutional rights nor the customary standard of review was changed by the operation of the Twenty-first Amendment. An examination of

these decisions indicates that our review of Mississippi law in this case should proceed in the same manner.

In Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), a state statute provided that public officials could post a notice in all liquor stores that all sales or gifts of alcoholic beverages to a particular person were forbidden if "by excessive drinking," that person was "dangerous to the peace" of the community or had exposed himself or his family "to want." Id., 400 U.S. at 434, 91 S.Ct. at 508, 27 L.Ed.2d at 517. The Supreme Court held that before the state could attach such a "badge of infamy" to a citizen, the requirements of procedural due process must be met. Id., 400 U.S. at 437, 91 S.Ct. at 510, 27 L.Ed.2d at 518-19. Although recognizing the state's "extremely broad" power over liquor, id., 400 U.S. at 436, 91 S.Ct. 509, 27 L.Ed.2d

at 518, the Court did not relax the standards otherwise mandated by the due process clause. See also Hornsby v. Allen, 326 F.2d 605, 609 (5th Cir.1964) ("states do not escape the operation of the 14th Amendment in dealing with intoxicating beverages by reason of the 21st Amendment;" due process requirements apply to liquor licensing procedure); Vintage Imports, Ltd. v. Joseph E. Seagram & Sons, Inc., 409 F.Supp. 497, 506-07 (E.D.Va.1976).

The relationship between the Twenty-first Amendment and other constitutional provisions were explicitly addressed in Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). In that case, the Court held that an Oklahoma statute which prohibited the sale of 3.2% beer to males under the age of 21 and to females under the age of 18, invidiously discriminated against males 18-20 years of age in violation of the equal protection

clause. In its evaluation of the state's claim that the Twenty-first Amendment justified the statute, the Court traced the history of liquor regulation that culminated in passage of the Twenty-first Amendment and concluded that it "primarily created an exception to the normal operation of the Commerce Clause." 429 U.S. at 206, 97 S.Ct. at 461, 50 L.Ed.2d at 412.<sup>19</sup>

The Court continued:

Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one

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<sup>19</sup>Although the Twenty-first Amendment's grant of power over transportation or importation of liquor logically includes other supplementary powers, "[w]e should not, however, lose sight of the explicit grant of authority." California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 107, 100 S.Ct. 937, 944, 63 L.Ed.2d 233, 244 (1980). Moreover, even in the area of commerce the state's power under the Twenty-first Amendment is not free from other constitutional restraints. Id., 445 U.S. at 108-09, 100 S.Ct. at 944-45, 63 L.Ed.2d at 245-46 (federal commerce power).

commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." P. Brest, *Processes of Constitutional Decisionmaking, Cases and Materials*, 258 (1975). Any departures from this historical view have been limited and sporadic.

Id.; see also United States v. Texas, 695 F.2d 136, at 138-139 (5th Cir. 1983).

The Court unequivocally resolved the standard of review issue in Craig:

We thus hold that the operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case.

429 U.S. at 209, 97 S.Ct. at 463, 50 L.Ed.2d at 414. See also White v. Fleming, 522 F.2d 730, 733 (7th Cir. 1975) (notwithstanding Twenty-first Amendment, it "is still necessary to consider and apply the appropriate equal protection test"); Women's Liberation Union of Rhode Island, Inc. v. Israel, 379 F.Supp. 44, 48

(D.R.I.1974), aff'd 512 F.2d at 106 (1st Cir.1975).

The Court in Craig distinguished LaRue by suggesting that the Twenty-first Amendment alone would have been insufficient to "strengthen" state power and dilute the standard of review; it was necessary to couple that factor with the "conduct" element of the affected expression.<sup>28</sup>

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<sup>28</sup>To put it bluntly, the Court gave LaRue short shrift:

It is true that California v. LaRue, 409 [U.S. 109, 115, 93 S.Ct. 390, 395, 34 L.Ed.2d 342 (1972)], relied upon the Twenty-first Amendment to "strengthen" the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances "partake more of gross sexuality than of communication," [id., 409 U.S. at 118, 93 S.Ct. at 397, 34 L.Ed.2d at 352]. Nevertheless, the Court has never recognized sufficient "strength" in the Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause.

(Footnote continued)

Most recently, the Supreme Court applied its customary standard of review for cases arising under the Establishment Clause<sup>21</sup> of the First Amendment in a case challenging a state liquor zoning statute.

Larkin v. Grendel's Den, Inc., \_\_\_ U.S.

\_\_\_, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982). The Court struck down a provision that vested in churches and schools the power effectively to veto liquor license applications for establishments within five hundred feet of the church or school.

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(Footnote continued)

429 U.S. at 207, 97 S.Ct. at 462, 50 L.Ed.2d at 413 (emphasis added). We are unwilling to read the second sentence of this passage as distinguishing LaRue from Craig solely because one case involved the First Amendment and the other, the Equal Protection Clause. Since both cases involved individual rights assertable against the states through the Fourteenth Amendment, we can discern no meaningful principle underlying such a distinction.

<sup>21</sup>See, e.g. Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971); Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

There was no question of the appropriate standard of review; the Court observed in a footnote that "[t]he State may not exercise its power under the 21st Amendment in a way which impinges upon the Establishment Clause of the First Amendment." Id. 103 S.Ct. at 510 n. 5.

These cases establish that when state laws related to liquor regulation have come in direct conflict with constitutional guarantees that the Fourteenth Amendment requires the states to respect, the Supreme Court has reviewed the state laws according to the standards otherwise applicable to the constitutional guarantees.<sup>22</sup> The Twenty-first Amendment

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<sup>22</sup>See also Costa v. Bluegrass Turf Service, Inc., 406 F.Supp. 1003 (E.D.Ky.1975) (three-judge court) (durational residence laws for employees of liquor license holders subjected to compelling state interest test and held to violate plaintiffs' right to interstate travel).

did not change the standard of review. We believe that this principle should apply to the Constitution's guarantee of free speech as well as to its guarantees of equal protection and due process, and its prohibition of an establishment of religion. As we have explained, an exception to this principle, recognized in LaRue and Bellanca, was limited to liquor regulations that incidentally burden expression. Since that exception is not applicable to the Mississippi laws before us, we now turn to the application of customary commercial speech principles to the facts of this case.

IV. Is the Mississippi liquor advertising law a permissible regulation of commercial speech?

The Supreme Court recently dismissed a liquor advertiser's appeal for want of a substantial federal question thereby upholding an Ohio regulation of liquor advertising in Queensgate Investment Co.

v. Liquor Control Commission, 69 Ohio St.2d 361, 433 N.E.2d 138, appeal dismissed \_\_\_\_ U.S. \_\_\_, 103 S.Ct. 31, 74 L.Ed.2d 45 (1982). To decide whether Mississippi's advertising ban is a permissible regulation of commercial speech, we therefore must first decide whether that decision is controlling in the present case. In Queensgate, the holder of an Ohio permit to sell liquor by the drink had challenged a state regulation that prohibited such permit holders from referring to price or price advantage in their advertising. Ohio law permitted all other forms of advertising by permit holders and also permitted manufacturers and distributors of liquor to advertise. Id. The Ohio Supreme Court rejected the permit holder's claim that the regulation violated its commercial speech rights and the Supreme Court summarily dismissed its appeal.

[8] Although summary dispositions by the Supreme Court are binding on this court, those decisions extend only to "the precise issues presented and necessarily decided by those actions." Mandel v. Bradley, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977). Moreover, they "should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." Id. The facts and issues in Queensgate are quite different than those in this case. The Ohio regulatory scheme was much narrower in scope than Mississippi's and its limitation to price advertising may well involve different state interests. Also, application of the regulation against liquor licensees raises different constitutional issues than enforcement of a subject matter ban against publishers and broadcasters. See note 7, supra; cf. California v. LaRue, supra, 409 U.S. at

118, 93 S.Ct. at 397, 34 L.Ed.2d at 352 (approving proscription of expression only in licensed establishments). As we have observed before, while Supreme Court summary dismissals of challenges to state statutes may caution us against finding analogous statutes of other states unconstitutional, we are not relieved of our duty "to undertake an independent examination of the merits." Plante v. Gonzalez, 575 F.2d 1119, 1126 (5th Cir.1978), cert. denied 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979) (quoting Bradley, supra, 432 U.S. at 177, 97 S.Ct. at 2241). That undertaking is especially necessary where, as here, the Supreme Court's prior decision necessarily involved application of a complex standard like the Central Hudson test to very different facts. Rather than speculate upon the applicability of Queensgate beyond its own context, we will seek to apply the more completely articulated principles

announced by the Supreme Court after full argument in its numerous commercial speech opinions. See Bradley, supra, 432 U.S. at 176, 97 S.Ct. at 2240, 53 L.Ed.2d at 205.<sup>13</sup>

The standards for reviewing restrictions on constitutionally protected commercial speech were explained by the Supreme Court in Central Hudson:

The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may

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<sup>13</sup>In a recent decision, the Court of Appeals for the Tenth Circuit apparently thought that Queensgate required relaxation of the otherwise applicable standard of review for commercial speech regulations when the Twenty-first Amendment is involved. Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490, 502 (10th Cir. 1983). For the reasons discussed in Part III, supra, we decline to follow that decision.

not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

447 U.S. at 564, 100 S.Ct. at 2350, 65

L.Ed.2d at 349-50. We will consider each element of the test in turn.

The district court found that Mississippi's interest in its liquor advertising ban is the promotion of temperance and that this is a substantial state interest. Appellees do not challenge these findings. In its brief, the state characterizes its interest as "safeguarding the health, safety and general welfare of its citizens" by controlling liquor consumption. Regardless of whether Mississippi's interest is stated in terms of temperance or health and safety, the district court was clearly correct in finding it substantial. Maintenance of public health and safety is a basic function of government; it is obviously a substantial state interest.

Though responsive in part to moral and ethical considerations, themselves appropriate goals of state activity, the state's interest in temperance is closely allied with its interest in health and safety. Moreover, the long history of pervasive state and federal regulation of alcoholic beverages further supports our conclusion that this too is a substantial state interest. See generally Craig v. Boren, supra, 429 U.S. at 204-206, 97 S.Ct. at 460-61, 50 L.Ed.2d at 411-12 (collecting cases and statutes).

[9] Since it is established that Mississippi is pursuing a substantial legislative end, the issue becomes whether it has chosen permissible means. We must first ask whether the advertising ban "directly advances" the health and safety of Mississippi residents; "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." Central Hudson,

supra, 447 U.S. at 564, 100 S.Ct. at 2350, 65 L.Ed.2d at 350. We have concluded that the Mississippi law does not pass muster under this test.

The district court found that the advertising ban, "practically, does little to directly advance the government's interest" for two reasons. First, the court noted that the state had failed to produce "concrete scientific evidence" to substantiate its position that liquor advertising stimulates consumption. Thus, the court reasoned that the state had failed to show that an advertising ban furthered its goal in any way. The parties introduced conflicting expert testimony on this issue; the district court apparently credited the testimony of appellee's expert, who testified that the major function of liquor advertising is to increase market share and promote brand loyalty, and that no reputable scientific study had proved a positive correlation

between liquor advertising and increased individual consumption. See Cable-Com General, Inc., v. Crisp, No. CIV-81-290-W (W.D.Okla. Dec. 18, 1981), rev'd 699 F.2d 490 (10th Cir.1983) (advertising ban is an indirect means of advancing state interest in public health and welfare); Oklahoma Telecasters Ass'n v. Crisp, No. CIV-81-439-W (W.D.Okla. Dec. 18, 1981), rev'd 699 F.2d 490 (10th Cir.1983) (same). Mississippi argues that the district court was wrong to require evidence on this point and that based upon "common sense" this court should judicially notice that advertising increases consumption.<sup>24</sup>

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<sup>24</sup>In Central Hudson, the Supreme Court took judicial notice that an electric utility's advertising increased demand for electricity and that the state's goal of energy conservation was thus directly advanced by an advertising ban. 447 U.S. at 569-70, 100 S.Ct. at 2353 65 L.Ed.2d at 353. However, unlike the liquor advertisers in this case, the utility in Central Hudson had a monopoly; (Footnote continued)

Although we are inclined to regard at least some increased consumption as an inevitable result of promotional advertising, judicial notice of that fact would not change our decision in this case. Even if it could be assumed that in the abstract advertising always promotes consumption instead of increased market share, we would be unable to determine that the intrastate advertising ban enacted by Mississippi directly promotes the state's interest in public health and safety. We reach this conclusion for the second reason cited by the district court: residents of Mississippi are exposed to so much liquor advertising from sources outside the state that the intrastate ban necessarily must have a minimal effect on consumption and hence little effect on

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(Footnote continued)

there was no possibility that its advertising would affect market share instead of consumption.

promotion of the state's asserted interest.

Uncontradicted evidence in the record amply supports the district court's finding that "residents of the State of Mississippi are literally inundated with liquor advertisements from sources originating outside the state." For example, as the district court noted, appellees' evidence demonstrated that 62 national magazines containing alcoholic beverage advertisements were found in the Jackson, Mississippi Metropolitan Library at the time of trial. The library also subscribed to fifteen out-of-state newspapers carrying such advertising. The record also shows that several newspapers from neighboring states, such as the Mobile Register from Alabama and the New Orleans Times-Picayune, have substantial circulation within the state and contain such advertising. One such newspaper, the Memphis Commercial Appeal, publishes a

special edition focusing on Mississippi news in which liquor ads appear. Finally, television and radio stations located in Alabama, Louisiana and Tennessee, together with cable television stations in other states, regularly broadcast wine commercials in Mississippi.

Given these facts, we must find that the Mississippi advertising law has not been designed carefully enough to withstand First Amendment attack. As we have seen, Central Hudson's intermediate level of scrutiny requires a close "fit" between legislative means and ends; the Supreme Court has declined to uphold commercial speech regulations where the nexus between the asserted interest and the regulation was speculative.<sup>25</sup> The state is required

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<sup>25</sup> 447 U.S. at 564-65, 100 S.Ct. at 2350-51, 65 L.Ed.2d at 350; see also Virginia Pharmacy, supra, 425 U.S. at 769, 96 S.Ct. at 1829; Bates, supra, 433 U.S. (Footnote continued)

to establish this relationship by record evidence. Linmark Associates, supra, 431 U.S. at 95-96, 97 S.Ct. at 1619-1620, 52

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(Footnote continued)

at 378, 97 S.Ct. at 2706; Linmark Associates, supra, 431 U.S. at 95-96, 97 S.Ct. at 1619-1620. Contrary to appellants' argument, Metromedia, Inc. v. City of San Diego, supra did not vitiate this requirement. In that case, the court approved an ordinance allowing on-site commercial billboards but prohibiting off-site commercial billboards, stating that the city's distinction was "reasonabl[e]." 453 U.S. at 512, 101 S.Ct. at 2894, 69 L.Ed.2d at 817 (plurality opinion, joined in relevant part by Stevens, J.). Concurring in the judgment, Justice Brennan protested that Central Hudson requires more than rational basis scrutiny. Id., 453 U.S. at 505 n. 12, 101 S.Ct. at 2891 n. 12, 69 L.Ed.2d at 831 n. 12. Whatever change in law Metromedia may have effected, it is not applicable here. But see Oklahoma Telecasters Ass'n, supra, 699 F.2d at 500-01 (liquor advertising ban is not "unreasonable" means of reducing consumption, relying on Metromedia). Content-neutral speech restrictions have been scrutinized less closely than restrictions based on content, both inside and outside the commercial context. See e.g. Virginia Pharmacy, supra, 425 U.S. at 769-71, 96 S.Ct. at 1829-30, 48 L.Ed.2d at 363-64; see generally L.Tribe, American Constitutional Law §§ 12-2 to -3 (1978); Redish, The Content Distinction in First Amendment Analysis, 34 Stan.L.Rev. 113

(Footnote continued)

L.Ed.2d at 163-64. Mississippi has introduced nothing in this case which convinces us that its intrastate advertising ban has any appreciable affect on liquor consumption in light of the state's saturation with ads from out-of-state sources.

Accordingly, the ban has not been shown directly to advance public health and safety. Indeed, we think at best it provides "ineffective" and "remote" support for the state's purpose. Central Hudson, supra, 447 U.S. at 564, 100 S.Ct. at 2350, 65 L.Ed.2d at 350. When a state chooses

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(Footnote continued)

(1981). Metromedia involved restrictions on the location of a particular medium of commercial expression -- billboards. Those restrictions are reviewable under less stringent standards than a ban of particular subject matter -- liquor ads. See Central Hudson, supra, 447 U.S. at 566 n. 9, 100 S.Ct. at 2351 n. 9, 65 L.Ed.2d at 351 n. 9 (review with special care regulations that entirely suppress commercial speech to pursue non-speech related goal); cf. Metromedia, supra, 453 U.S. at 525, 101 S.Ct. at 2901, 69 L.Ed.2d at 826 (Brennan, J., concurring).

to impose such a severe ban upon protected commercial speech, it must at least show that its law does some good.

We recognize that our power to strike down state laws as unconstitutional is strong medicine; we do not administer it lightly. We also recognize that because of its perceived lack of jurisdiction over out-of-state media businesses and other practical constraints, the Mississippi legislature may be unable to fashion any liquor advertising ban consistent with our decision today.<sup>26</sup> As a federal court, we are always reluctant to invade the state

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<sup>26</sup>Should such a statute be devised, it would still have to pass muster under the "least restrictive alternative" prong of the Central Hudson analysis. 447 U.S. at 569-70, 100 S.Ct. at 2353-54, 65 L.Ed.2d at 353-54; see generally Comment, First Amendment Protection for Commercial Advertising; The New Constitutional Doctrine, 44 U.Chi.L.Rev. 205, 243-51 (1976). In light of our decision that the Mississippi law does not directly advance its interests, we need not reach this issue in this case.

legislative province so thoroughly.

Nevertheless, we are convinced that our decision, though difficult, is required by the Constitution and the law. As we have seen, the First Amendment has been read to establish the principle that, as a general rule, our government may not seek its goals by fostering public ignorance.

Virginia Pharmacy, supra, 425 U.S. at 769-70, 96 S.Ct. at 1829-30, 48 L.Ed.2d at 363. As Justice Blackmun put it, "This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice." Central Hudson, supra, 447 U.S. at 574-75, 100 S.Ct. at 2356, 65 L.Ed.2d at 356 (concurring opinion). While it is true that the Central Hudson test implies that suppression of information may sometimes be a permissible means of regulation in the commercial context, the

general principle remains; substantial barriers were erected for states that follow this route. The barriers are not breached by the Mississippi laws challenged here.

V. Appellees' appropriate remedy.

The district court declared each substantive provision of the advertising ban, Sections 67-1-37(e), 67-1-85, and 97-31-1, and Regulation No. 6, to be unconstitutional on its face and enjoined its enforcement. Because the virtual ban of intrastate liquor advertising effected by those provisions does not pass muster under Central Hudson, we affirm. Initially, we considered adopting of a limiting construction of Section 67-1-37(e), the provision granting rulemaking power to the ABC Division. As our prior discussion has demonstrated, the First Amendment does not deprive states of the power to make rules prohibiting advertising that misleads

or actively encourages illegal activity. Similarly, rules could require advertising to contain state-prescribed disclosures or warnings. Although this limited rule-making power is clearly constitutional, we have determined that a construction so limiting Section 67-1-37(e) is not appropriate action by a federal court. First, such a construction must be authoritative, and as a federal court we lack jurisdiction authoritatively to construe state laws. Hynes v. Mayor of Orodell, 425 U.S. 610, 622, 96 S.Ct. 1755, 1761, 48 L.Ed.2d 243 (1976); United States v. Thirty-seven Photographs, 402 U.S. 363, 369, 91 S.Ct. 1400, 1404, 28 L.Ed.2d 822, 830 (1971); see also Metromedia, supra, 453 U.S. at 521-22 n. 26, 101 S.Ct. at 2899-2900 n. 26, 69 L.Ed.2d at 823-24 n. 26. Moreover, the absolute terms of the statute may preclude any reasonable limiting

construction.<sup>27</sup> We therefore hold that Sections 67-1-37(e), 67-1-85, and 97-31-1, together with Regulation No. 6, are facially unconstitutional and that the district court properly enjoined their enforcement.

[10] The district court also extended its order to enjoin application of certain remedial provisions to the extent that they are used to enforce the substantive provisions discussed above. See note 5, supra. Application of the injunction to Section 67-1-87, the general penalty provisions of the Local Option Law, is clearly proper; by its terms, it applies to any violation of the Local

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<sup>27</sup>The ABC Division is empowered, with limited exceptions, "[t]o issue rules prohibiting the advertising of alcoholic beverages in the state in any class of media and to provide further that all advertising of the retail price of alcoholic beverages shall be prohibited." Miss. Code Ann. § 67-1-37(e)(1972).

Option Law, including violation of the advertising ban by persons such as the appellees. This portion of the district court's judgment also is affirmed. In enjoining enforcement of Regulation No. 1 and Regulation No. 36, however, the district court's judgment goes too far. Regulation No. 1 prevents any person who violates the Local Option Law from obtaining any of the permits required to sell liquor under the statute. Regulation No. 36 authorizes the Commission, which is the exclusive liquor wholesaler in the state, to "delist" any brand from its approved list and has been used to punish distillers who advertised. The parties have stipulated that none of the appellee media businesses hold or have ever held any license under the Local Option statute, and that none are sellers or manufacturers of liquor. Thus, Regulations No. 1 and No. 36 could not be applied to them and could not operate to

infringe their own rights. Since overbreadth standing is not available to parties asserting commercial speech claims, Flipside, supra, 455 U.S. at 496, 102 S.Ct. at 1192, 71 L.Ed.2d at 370, appellees lack standing to challenge regulations that would only infringe the rights of others.<sup>28</sup> Accordingly, the district court's judgment is reversed to the extent that it enjoins enforcement of Regulations No. 1 and No. 36.

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<sup>28</sup>Under traditional overbreadth analysis, a litigant who has suffered no constitutional injury by application of a statute may attack it based upon its potentially invalid applications with respect to third parties with whom he has no special relationship. E.g. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980) (collecting cases); see generally Note, The First Amendment Overbreadth Doctrine, 83 Harv.L.Rev. 844 (1970). Because the doctrine is designed to protect against the "chilling effect" of overbroad statutes, it has not been applied to commercial speech, which is thought to be less easily deterred than other forms of

(Footnote continued)

To summarize, with the limited exception of the remedial regulations discussed above, we find that Mississippi's ban of liquor advertisements in intrastate media violates appellees' First and Fourteenth Amendment rights to disseminate commercial speech and is accordingly unconstitutional on its face.<sup>22</sup> The judgment of the district court is

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(Footnote continued)

expression. Central Hudson, supra, 447 U.S. at 565 n. 8, 100 S.Ct. at 2351 n. 8, 65 L.Ed.2d at 350 n. 8.

<sup>22</sup>The district court also held that Mississippi's intrastate advertising ban violated the Equal Protection Clause. In view of our decision that the challenged law violates the First Amendment, we need not resolve this issue. We do think that it is appropriate, however, to point out that the district court's equal protection analysis was flawed. The district court held that because Mississippi was inundated with out-of-state advertising and because appellants had failed to prove a correlation between advertising and increased consumption, no rational basis for the state law had been shown. However, the issue under rational basis scrutiny is not whether the statute furthers the state interest in fact, but whether the state

(Footnote continued)

AFFIRMED IN PART AND REVERSED IN  
PART.

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(Footnote continued)

rationality could have decided that it  
would. Arceneaux v. Treen, 671 F.2d 128,  
132 (5th Cir. 1982). Moreover, the dis-  
trict court should have considered whether  
rational basis scrutiny was appropriate at  
all since stricter standards of review  
have been applied where fundamental rights  
guaranteed by the Constitution are in-  
fringed. Id. at 131-32; Police Dept. of  
Chicago v. Mosley, 408 U.S. 92, 92 S.Ct.  
2286, 33 L.Ed.2d 212 (1972) (First Amend-  
ment). These remarks are offered only to  
correct a misstatement of law below; we  
express no opinion on the merits of  
appellees' equal protection claim.

Appellees' complaint also asserted a  
claim under the Due Process Clause of the  
Fourteenth Amendment. The due process  
claim was not a basis of the district  
court's judgment and was not briefed or  
argued on appeal. We deem it abandoned.

83-1244

NO. \_\_\_\_\_

Office of the Supreme Court, U.S.  
FILED  
JAN 25 1984  
ALEXANDER L. STEVENS  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

LAMAR OUTDOOR ADVERTISING, INC. ET AL.,  
Petitioners

v.

MISSISSIPPI STATE TAX COMMISSION, ET AL.,  
Respondents

---

VOLUME 3 OF APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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APPENDICES - VOL. 1-3  
TABLE OF CONTENTS

	Page
APPENDIX A (VOL. 1) EN BANC OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, OCTOBER 3, 1983 .....	1a
APPENDIX B (VOL. 2) PANEL OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, MARCH 11, 1983 .....	73a
APPENDIX C (VOL. 3) ORDER OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FOR REHEARING EN BANC MARCH 11, 1983 .....	161a
APPENDIX D (VOL. 3) OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION, FEBRUARY 8, 1982 .....	163a
APPENDIX E (VOL. 3) JUDGMENT OF UNITED STATES COURT OF APPEALS ON REHEARING EN BANC OCTOBER 31, 1983 .....	223a
APPENDIX F (VOL. 3) CONSTITUTIONAL PROVISIONS STATUTES, AND REGULATIONS INVOLVED .....	226a

APPENDIX C

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 82-4076

LAMAR OUTDOOR ADVERTISING, INC.,

et al.,

Plaintiffs-Appellees,

v.

MISSISSIPPI STATE TAX COMMISSION,

et al.,

Defendants-Appellants.

March 11, 1983

John E. Milner, W. Timothy Jones,  
Peter M. Stockett, Jr., Asst. Atty. Gen.,  
Jackson, Miss., for defendants-appellants.

Center for Science in the Public Interest,  
Bruce Silverglade, Dir. of Legal Affairs,  
Washington, D.C., for amicus curiae.

Gary W. Gardenhire, Asst. Atty. Gen.,  
Civ. Div., Oklahoma City, Okl., for State  
of Oklahoma.

Peter H. Meyers, Washington, D.C.,  
for Accuracy and Action About Alcohol Ad-  
diction.

John F. Banzhaf, III, Washington,  
D.C., for Ash.

James K. Child, Jr., Henry E. Chatham,  
Jr., Richard D. Gamblin, Jackson, Miss.,  
Jack H. Pittman, Hattiesburg, Miss., for  
plaintiffs-appellees.

Before CLARK, Chief Judge, BROWN,  
GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ,  
RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD,  
JOLLY and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

A majority of the Judges in active  
service, on the Court's own motion, having  
determined to have this case 701 F.2d 314  
reheard en banc,

IT IS ORDERED that this cause shall  
be reheard by the Court en banc with oral  
argument on a date hereafter to be fixed.  
The Clerk will specify a briefing schedule  
for the filing of supplemental briefs.

APPENDIX D

United States District Court,  
S.D. Mississippi,  
Jackson Division  
Civ. A. No. J78-0472(R)

LAMAR OUTDOOR ADVERTISING, INC.,  
et al.,

v.

MISSISSIPPI STATE TAX COMMISSION,  
et al.,

Feb. 8, 1982

James K. Child, Henry E. Chatham,  
Jackson, Miss., Jack Pittman, Hattiesburg,  
Miss., for plaintiffs.

Bill Allain, Atty. Gen., Peter  
Stockett, Jr., Asst. Atty. Gen., W.  
Timothy Jones, John E. Milner, Jackson,  
Miss., for defendants.

## OPINION

DAN M. RUSSELL, Jr., Chief Judge.

Fifty-six media Plaintiffs<sup>1</sup> have  
invoked the jurisdiction of this Court

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<sup>1</sup>Plaintiffs may be grouped as outdoor advertising plaintiffs, newspaper and electronic media plaintiffs: outdoor advertising plaintiffs include: Lamar Outdoor Advertising, Inc.; Outdoor Communications, Inc.; and Classic Advertising, Inc., which are Mississippi corporations. Plaintiff National Advertising Company is a Delaware corporation authorized to do business in Mississippi. Plaintiff Walter C. Vick is an individual doing business as Mississippi Outdoor Advertising, a sole proprietorship. Each of these outdoor advertising plaintiffs is a bonded and duly authorized outdoor advertiser, regulated by the Mississippi State Highway Commission under Miss. Code Ann. Sections 49-23-1 et seq. (1972). Their business consists of selling advertising space on outdoor signs and billboards which are established and maintained in conformity with the Highway Beautification Act of 1965 (23 U.S.C. Section 131) and under the requirements of Miss. Code Ann. Sections 49-23-1 et seq. (1972). (Joint Pre-Trial Order Section 3, par. 1, at 7, Ex. G-1).

Newspaper plaintiffs include: Mississippi Press Register, Inc.; Natchez Newspapers, Inc.; Grenada Newspapers, Inc.; Commonwealth Publishing, Inc.; Delta-Democratic Publishing Co.: Bolivar  
(Footnote continued)

pursuant to 28 U.S.C. Sections 1331, 1343 and 42 U.S.C. Section 1983 in this non-class action suit in order to challenge

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(Footnote continued)

Newspapers, Inc. and Capital Reporter Publishing Company, Inc. which are Mississippi corporations. The newspaper plaintiffs publish and distribute daily and weekly newspapers in Mississippi, and a substantial portion of their gross revenues is derived from the sale of advertising space in the newspapers.

Electronic media plaintiffs include: Service Broadcasters, Inc.; Lee Broadcasting Company; Rebel Broadcasting Company of Mississippi; New South Communications, Inc.; New South Broadcasting Corporation; Fritts Broadcasting, Inc.; Deep South Radio, Inc.; New Laurel Radio Station, Inc.; Television America Sixteen, Inc.; Bob McRaney Enterprises, Inc.; Gateway Broadcasting, Inc.; First Natchez Corporation; Air Enterprises, Inc.; Southeast Mississippi Broadcasting Company; Southland, Inc.; Voice of the New South, Inc.; P.T.C.; Inc.; WGUF, Inc.; Haddox Enterprises, Inc.; Broadcasters and Publishers, Inc.; WGUD Stereo, Inc.; Central Television, Inc.; Communications Improvements, Inc.; Gulf Coast Broadcasting Company; Radio Hattiesburg, Inc.; Charisma Broadcasting Company; Broadcast Associates, Inc.; Southern Electronics Company, Inc.; Tung Broadcasting Company; Town and Country Broadcasting Company, Inc.; Martin Broadcasting Company; Starkville Broadcasting Company; WJDX, Inc. (hereinafter referred to collectively as

(Footnote continued)

the constitutionality of the Mississippi statutes and the regulations of the Alcoholic Beverage Control Division (hereinafter "ABC Division") of the Mississippi State Tax Commission<sup>2</sup> which control and

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(Footnote continued)

the "Electronic Media Plaintiffs"), which are Mississippi corporations except for plaintiffs, Tri-Cities Broadcasting Company and WJDX, Inc., which are, respectively, a Texas corporation and a Delaware corporation, both authorized to do business in Mississippi, and plaintiffs, Starkville Broadcasting Company and Southeast Mississippi Broadcasting Company, which are Mississippi partnerships. Each of the electronic media plaintiffs are licensees of the Federal Communications Commission.

<sup>2</sup>The Mississippi State Tax Commission, defendant herein, is an administrative agency of the State of Mississippi, established by and existing under and by virtue of Miss. Code Ann. Sections 27-3-1 *et seq.* The ABC Division of the Mississippi State Tax Commission was established by and is existing under and by virtue of Section 67-1-19. Defendants A.C. Lambert, Sr., Robert A. Baggett, and Latrelle Ashley are members of the Mississippi State Tax Commission (Ex. G-1 at 9-10). The Mississippi State Tax Commission, its ABC Division, and the members of the Commission are charged with the responsibility of administering and

(Footnote continued)

effectively prohibit the advertisement of alcoholic beverages<sup>3</sup> in this state. Specifically, Plaintiffs contend that: (1) the challenged statutes and regulations and their enforcement violate First Amendment guarantees of freedom of speech and press

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(Footnote continued)

enforcing the provisions of the Local Option Law. Sections 67-1-1 et seq. (Ex. G-1 at 10), enacted by the Mississippi Legislature in 1966 (Laws, 1966, Ch. 540) upon possible penalty of forfeiture of office under Section 67-1-91. Sections 67-1-37(e), 67-1-85, 67-1-87, and Regulations 1, 6, and 36 of the ABC Division of the State Tax Commission are part of this Local Option Law.

Former defendant, A. F. Summer was, until January 16, 1980, the Attorney General of the State of Mississippi and, as such, was charged with the responsibility of prosecuting all suits, civil or criminal, in which the State of Mississippi is interested. Since January 16, 1980, defendant Bill Allain has been the Attorney General of the State of Mississippi. Defendant Allain is, and Summer was, specifically responsible for enforcing two of the challenged statutes: Sections 67-1-85 and 97-31-1. (Ex. G-1 at 10).

<sup>3</sup>"Alcoholic beverages" in this action refers to distilled spirits and wine. Beer is excluded.

and Article 3, Section 13 of the Mississippi Constitution of 1890; (2) the challenged statutes and regulations and their enforcement deprive Plaintiffs of property without due process of law in violation of the due process clause of the Fourteenth Amendment and Article 3, Section 14 of the Mississippi Constitution of 1890; and (3) the challenged statutes and regulations and their enforcement deny Plaintiffs equal protection of the law in violation of the equal protection clause of the Fourteenth Amendment. To prevent further violation of their civil rights, Plaintiffs seek: (1) a declaratory judgment pursuant to 28 U.S.C. Sections 2201 and 2202 that the challenged laws are unconstitutional; (2) a prohibitory injunction enjoining defendants from attempting to enforce the challenged laws; (3) alternatively, a mandatory injunction requiring the defendants to enforce the challenged laws against any and all advertisers who

advertise alcoholic beverages within Mississippi; (4) court costs; and (5) attorney's fees pursuant to 42 U.S.C. Section 1988.

Following discovery by both sides and extensive pre-trial proceedings before this Court, this action was tried before the Court without a jury on March 11-12, 1981. Having heard and considered the oral and documentary evidence presented by the parties, the Court hereby makes its Findings of Fact and Conclusions of Law as required by Fed.R.Civ.P. 52(a).

#### FINDINGS OF FACT

1. The Mississippi statutes and regulations which are challenged as unconstitutional in this action are as follows:

Miss. Code Ann. Section 67-1-85 (1972) effectively prohibits outdoor advertising of alcoholic beverages within Mississippi by proclaiming it "unlawful to advertise alcoholic beverages by means of signs,

billboards, or displays on or along any road, highway, street, or building."

Miss.Code Ann. Section 67-1-87

(1972), the general provision, provides that violations of Section 67-1-85 are punishable as a misdemeanor by a fine of not more than one thousand dollars (\$1,000.00) and/or imprisonment for not more than six months.

Miss.Code Ann. Section 67-1-37(e)

(Supp. 1980) empowers the State Tax Commission "(t)o issue rules prohibiting the advertising of alcoholic beverages in the state in any class of media and to provide further that all advertising of the retail price of alcoholic beverages shall be prohibited except on placards or signs in the interior of licensed premises which are not visible from the exterior." (emphasis added).

Miss.Code Ann. Section 97-31-1 (1972)

provides in pertinent part:

It shall be unlawful for any person, firm, corporation or association, or any servant, official or employee thereof, (1) to advertise upon any street car, railroad car, or other vehicle of transportation, or at any public place or resort, or upon any sign or billboard, or by circulars, poster, price lists, newspapers, periodicals, or otherwise, within this state, alcoholic, intoxicating or spirituous liquors, or intoxicating bitters or other drinks which if drunk to excess, will produce intoxication, including among others, brandy, whiskey, rum, gin, ale and porter, or to advertise the manufacture, sale, keeping for sale or furnishing of any of them, or the person from whom, or the firm or corporation from which, or the place where, or the method by which same, or any of them, may be obtained; (2) to circulate, publish, sell, offer for sale, or expose for sale, any newspaper, periodical, or other written printed matter in which any advertisement specified in this section shall appear, or to permit any sign or billboard containing such advertisement to remain upon one's premises; or (3) to circulate any price list, order blanks, or other matter, for the purpose of inducing or securing orders for said liquors, bitters, and drinks, or any of them hereinbefore mentioned, no matter where located...

Violations of Section 97-31-1 are considered to be criminal offenses and

public nuisances which are subject to injunctive relief.

Regulation 6 of the Alcoholic Beverage Control Division of the Mississippi State Tax Commission states that

(n)o person, firm or corporation shall originate advertisement in this State, dealing with alcoholic beverages by any means whatsoever, including but not limited to newspapers, radio, television, circular, dodger, word of mouth, signs, billboards, displays or any other advertising media ...

Regulation 1 of the ABC Division precludes violators of Alcoholic Beverage Control Law from obtaining permits pursuant to Miss. Code Ann. Section 67-1-57 (1972) for a period of twelve months following the violation.

Regulation 36 of the ABC Division provides that the Mississippi State Tax Commission may, in its discretion, "de-list" any size or brand of alcoholic beverages regardless of sales volume when, in its opinion, the "best interest of the

Alcoholic Beverage Control Division may be served."

2. Mississippi enacted the "Local Option Alcoholic Beverage Control Law," Miss. Code Ann. Section 67-1-1 et seq., in 1966 to reannounce the state's policy "in favor of prohibition of the manufacture, sale, distribution, possession and transportation of intoxicating liquors" and to express its intent to

vigorously enforce the prohibition laws throughout the state, except in those counties voting themselves out from under the prohibition law in accordance with the provisions of this chapter, and, in those counties, to require strict regulation and supervision of the manufacture, sale, distribution, possession and transportation of intoxicating liquor under a system of state licensing of manufacturers, wholesalers, and retailers, which licenses shall be subject to revocation for violations of this chapter. Miss. Code Ann. Section 67-1-3.

3. The Local Option Law permits a county, or a judicial district within a county, to bring itself out from under the state-wide prohibition by a majority vote

of the electors within the county or judicial district. Miss.Code Ann. Section 67-1-11--15. If the county or judicial district vote rejects coming out from under prohibition, or if an election is not held, the state-wide prohibition law remains in effect in that area. If a county or judicial district votes itself out from under the state-wide prohibition, then, subject to all of the "provisions and restrictions" of the Local Option Law, the "possession and transportation" of alcoholic beverages is legal throughout the county or judicial district while the "manufacture sale and distribution" of alcoholic beverages is lawful only in incorporated municipalities, qualified resort areas and clubs within the county or judicial district. Miss.Code Ann. Section 67-1-7 (Supp. 1980).

4. At the time of trial in this matter, of eighty-two counties in Mississippi, forty-three counties and four

judicial districts in four other counties had exercised their option to legalize the possession, transportation, manufacture, sale and distribution of alcoholic beverages to the extent permitted by the Local Option Law.<sup>4</sup> Thirty-five counties and four judicial districts in four other counties had chosen not to exercise their option under the Local Option Law.<sup>5</sup>

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<sup>4</sup>Those counties include: Adams, Alcorn, Amite, Bolivar, Carroll, Chickasaw-Second Judicial District, Claiborne, Clay, Coahoma, Copiah, DeSoto, Forrest, Hancock, Harrison, Hinds-First Judicial District, Holmes, Humphreys, Issaquena, Jackson, Jasper-First Judicial District, Jefferson, Jefferson Davis, Jones-Second Judicial District, Kemper, Lafayette, Lauderdale, Lee, Leflore, Lowndes, Madison, Marion, Marshall, Oktibbeha, Panola, Perry, Pike, Quitman, Sharkey, Sunflower, Tallahatchie, Tunica, Warren, Washington, Wayne, Wilkinson, Yalobusha, and Yazoo. (Ex. D-5).

<sup>5</sup>Those counties include: Attala, Benton, Calhoun, Chickasaw-First Judicial District, Choctaw, Clarke, Covington, Franklin, George, Greene, Grenada, Hinds-Second Judicial District, Itawamba, Jasper-Second Judicial District,

(Footnote continued)

5. According to the testimony of the Director of the State Alcohol Beverage Control Division of the State Tax Commission, the vast majority of Mississippi's population reside in those counties which have elected to renounce the state's policy of prohibition.

6. Enforcement of the Alcoholic Beverage Control Law is the responsibility of the Mississippi State Tax Commission Alcoholic Beverage Control Division and the members thereof under penalty of possible forfeiture of office. Miss. Code Ann. Section 67-1-85,-91 (1972). The Attorney General of the State of Mississippi is also responsible for

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(Footnote continued)

Jones-First Judicial District, Lamar, Lawrence, Leake, Lincoln, Monroe, Montgomery, Neshoba, Newton, Noxubee, Pearl River, Pontotoc, Prentiss, Rankin, Scott, Simpson, Smith, Stone, Tate, Tippah, Tishomingo, Union, Walthall, Webster, and Winston. (Ex. D-5).

\*See note 2 supra.

enforcing Miss. Code Ann. 67-1-85 which prohibits the advertisement of alcoholic beverages on outdoor signs and Section 97-31-1 which prohibits alcoholic beverage advertisement in newspapers and on billboards.

7. Regulation No. 6 is Defendants' primary legal basis for effectuating their interest in controlling alcoholic beverage advertising in this state. Regulation No. 6 provides in pertinent part that "(n)o person, firm or or corporation shall originate advertisement in this state, dealing with alcoholic beverages ..." (emphasis added). The policy of the State Tax Commission is not to enforce Regulation No. 6 and the other challenged statutes and regulations against any "person, firm or corporation" which does not "originate advertisements" of alcoholic beverages in this State, due to an absence of jurisdiction. The State Tax Commission has interpreted "originate advertisement in this State" to

mean that the central place of publication or dissemination of alcoholic beverage advertisements must be within the physical boundaries of the state in order for the challenged statutes and regulations to apply.'

8. The State contends its interest is regulating and effectively prohibiting the Plaintiffs from advertising alcoholic

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'This interpretation of Regulation No. 6 stems partially from two 1967 opinions of the Attorney General of the State of Mississippi pursuant to Miss. Code Ann. Section 7-5-25 (Supp. 1980), and its predecessor, Section 3834 (1942) which directs the Attorney General to issue his written opinion on an issue when requested by certain state or local officials. Essentially, these opinions stated that Mississippi has no control over publications printed and mailed outside the state which are distributed within the state. (Ex. D-7, D-8) Defendants also do not attempt to monitor or control commercial television and radio stations physically located outside the state which transmit wine commercials into the state. Defendants do enforce the challenged statutes and regulations against television and radio stations within Mississippi.

beverages is to protect the health, safety, and general welfare of the citizens of this state by controlling the artificial stimulation of the sale and consumption of alcoholic beverages. According to Defendant's expert, Dr. Marc Hertzman, Director of Hospital Services in the Department of Psychiatry and Social Sciences at the George Washington University Medical Center, this interest is substantiated by the considerable physiological and psychological effects alcohol consumption has on the human body. Alcohol consumption reportedly increases the incidences of mortality due to coronary heart disease, gastrointestinal cancer, cirrhosis of the liver and traffic accidents. Psychological effects of alcohol consumption reveal heightened depression, loss of self-esteem and familial and occupational difficulties. Dr. Hertzman recognizes the existence of a strong correlation between an increase in alcohol advertising and

consumption. Further he concludes that alcoholic beverage advertising will induce those who do not drink to partake and encourage those who do drink to imbibe more.

9. Plaintiff's expert, Dr. David Pittman, Chairman and Professor of Sociology at Washington University, specializing in alcoholism and alcoholic abuse,\* states that no credible scientific evidence exists to support Defendant's theory that increased alcoholic beverage advertising leads to increased consumption. Moreover, it is this expert's opinion that the state's statutory ban on alcohol advertising does little to advance their interest in promoting temperance because

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\*Dr. Pittman has done considerable research in the field of alcohol abuse. He has published numerous works concerning the effects of alcohol advertisements on consumption including Alcoholism and Advertising and "The Effects of Alcohol Beverage Ads, Practices and Messages on Alcohol Problems and Alcoholism in the United States."

of the constant and significant influx of alcohol advertisements into this state from magazines, newspapers, television and radio stations outside the state which permit advertisement of alcoholic beverages. Dr. Pittman maintains that more feasible methods exist for the treatment of alcoholism and for the promotion of temperance such as alcohol prevention programs targeted at certain groups.

10. Dr. Pittman contends that the alcohol advertisements themselves are intended to depict a major theme such as tradition, excellence or quality in order to enhance name-brand identification with the particular product. Furthermore, this expert concludes that the major function of advertising is to obtain an increase in the market share rather than to artificially stimulate alcohol consumption.

11. The evidence presented by Plaintiffs consisted of the testimony of numerous newspaper editors and publishers,

managers of radio and television stations and outdoor advertisers in this state regarding not only the tremendous financial loss they suffer as a result of the ban, but also the actual physical impossibility they encounter in attempting to effectuate a total alcoholic beverage advertisement ban in Mississippi where its citizens subscribe to an unlimited number of national and out of state newspapers, magazines, and radio and television broadcasts displaying alcohol advertisements.' Radio and television station managers described the difficulty they have monitoring programs to delete wine and beer commercials broadcast over the

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<sup>3</sup>Plaintiffs introduced into evidence not only a three page list of magazines found in the Jackson, Mississippi public library containing liquor advertisements, but also over fifteen actual ads taken from magazines ranging from Field & Stream to Better Homes & Gardens and TV Guide.

networks.<sup>18</sup> Newspaper publishers cited numerous instances where the same family in Mississippi will receive an in-state, local newspaper without liquor advertisements and also the New Orleans Times-Picayune, the Memphis Commercial Appeal, the Mobile Press or the Mobile Register, or the Wall Street Journal which are replete with alcohol advertisements. Plaintiffs also introduced into evidence a poster published by the Tourism Department of the Mississippi Agriculture and Industry Board featuring a mint julep designed to attract potential tourists to Mississippi. Indeed, this Court discovered a billboard eleven miles north of Hattiesburg in the southbound lane of Mississippi

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<sup>18</sup>The National Association of Broadcasters Television Code, Advertising Standards, Section IV, 7(A) denies radio and television operators the privilege of advertising liquor. Only wine and beer commercials are permitted when presented tastefully.

Highway 49 advertising for Ramada Inn motels. The advertisement bore a cocktail glass to signify the existence of a lounge. According to L. R. Mashburn, Chief of Enforcement of the ABC Division of the State Tax Commission since 1966, Ramada Inn had previously been requested to remove a similar sign found in the state because it was deemed to be in violation of the ban against liquor advertisement.

#### CONCLUSIONS OF LAW

The issue presented to the Court concerns whether the free speech clause of the First Amendment<sup>11</sup> prevents a state

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<sup>11</sup>Compare Williams v. Spencer, 662 F.2d 1200, 1205 (4th Cir. 1980) (judicial notice was taken of the fact that advertisements encouraging the use of drugs encourages the use thereof); Dunagin v. City of Oxford, 489 F.Supp. 763, 771 and n. 11 (N.D.Miss.1980), appeal pending, No. 80-2762 (5th Cir. 1981) (court determined that it was "medically known" that alcohol is dangerous; that a wider (Footnote continued)

from forbidding the advertisement of alcoholic beverages and whether the Twenty-First Amendment empowers the State to ban

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(Footnote continued)

availability of alcohol leads to higher rates of alcoholism and mortality; that the purpose of advertising alcoholic beverages is to promote consumption and to stimulate sales; and that increased sales of these beverages are highly correlated with increased problems associated with their use.) with High Ol' Times, Inc. v. Busbee, 456 F.Supp. 1035, 1040-41 (N.D.Ga. 1978), aff'd, 621 F.2d 141 (5th Cir. 1980) (per curiam) (drug-related material is protected by the First Amendment regardless of its aberrant, unpopular, and even revolutionary subject matter) and Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (a state may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients). Although this court cannot disagree with the conclusions reached by Mississippi's Northern District Court, nor can it in good faith agree wholeheartedly with the conclusions reached by that court on a motion for summary judgment attacking Miss. Code Ann. Section 97-31-1 (1972) which prohibits liquor advertisements in newspapers. This Court, on the other hand, heard expert testimony on the subject of alcoholic advertising, the state's complete statutory and regulatory ban of

(Footnote continued)

alcohol advertisements regardless of any First Amendment protection.<sup>12</sup> Secondly, Plaintiffs request that this Court consider their equal protection and due process claims in light of the Twenty-First Amendment.

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(Footnote continued)

such advertisements and the correlation between such advertisements and an increased consumption of alcohol.

<sup>12</sup>The issue before this Court is the precise question confronted by Judge William Keady in Dunagin v. City of Oxford, 489 F.Supp. 763, 765 (N.D.Miss. 1980), appeal pending, No. 80-2762 (5th Cir. 1981) wherein that court held that because alcohol advertisements promoted activity illegal in a substantial portion of Mississippi, then the State, pursuant to the broad powers invested in it under the Twenty-First Amendment, could regulate advertising even to the point of an absolute ban. The court relied upon California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) and Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 773, 96 S.Ct. 1817, 1831, 48 L.Ed.2d 346 (1976) to support its conclusion that the resolution of the case depended upon whether the advertisement of alcohol promoted an "entirely unlawful" activity subject to absolute suppression. See also note 11 supra.

The Twenty-First Amendment, enacted after fourteen years of unsuccessful enforcement of the Eighteenth Amendment and national prohibition, effectively repealed prohibition and placed the power to control liquor regulation in the states. Specifically, the amendment provided that "(t)he transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." It is unclear from the language of this provision whether a state's power to control alcohol is limited solely to transportation and importation aspects of commerce or whether it extends beyond those areas to all measures affecting commerce. More important, however, is the question of the degree of exclusive power allowed to the states free of federal restraint.

[1] In 1972, the United States Supreme Court in California v. LaRue, 409

U.S. 109, 116, 93 S.Ct. 390, 396, 34 L.Ed.2d 342 (1972), first addressed the effect of the Twenty-First Amendment on forms of expression protected by the First Amendment. The Court determined that the proper analytical framework to be invoked when questioning the authority of a state to enact a statute regulating alcohol is one of presumed state power because of the express grant of authority vested in the states, pursuant to the Twenty-First Amendment, to regulate the importation, distribution and consumption of alcohol.<sup>13</sup>

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<sup>13</sup>See also, New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981); California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980); Craig v. Boren, 429 U.S. 190, 205, 97 S.Ct. 451, 461, 50 L.Ed.2d 397 (1976); Doran v. Salem Inn, Inc., 422 U.S. 922, 932-33, 95 S.Ct. 2561, 2568-69, 45 L.Ed.2d 648 (1975); Seagram & Sons v. Hostetter, 384 U.S. 35, 41, 86 S.Ct. 1254, 1258, 16 (Footnote continued)

Early cases decided by the Supreme Court followed an absolutist position of deference to state liquor control.<sup>14</sup> However,

(Footnote continued)

L.Ed.2d 336 (1966); Castlewood International Corp. v. Miller, 626 F.2d 1200 (5th Cir. 1980); Blatnik Co. v. Ketola, 587 F.2d 379, 381-82 (8th Cir. 1978); Richter v. Department of Alcoholic Beverage Control, 559 F.2d 1168, 1170 (9th Cir. 1977), cert. denied, 434 U.S. 1046, 98 S.Ct. 891, 54 L.Ed.2d 797 (1978); Woods v. Alcoholic Beverage Appeals Board, 502 F.Supp. 528, 530 (C.D.Cal.1980); Dunagin v. City of Oxford, 489 F.Supp. 763, 772 (N.D.Miss.1980), appeal pending, No. 80-2762 (5th Cir. 1981); DieBurg, Inc. v. Underhill, 465 F.Supp. 1176, 1177 (M.D.Fla.1979); Felix v. Milliken, 463 F.Supp. 1360, 1375 (E.D.Mich.1978).

<sup>14</sup>See The Licenses Cases 5 How. 504, 579, 12 L.Ed. 256 (1847) (recognizing broad powers of state government to regulate alcohol within their borders); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395, 59 S.Ct. 256, 83 L.Ed. 246 (1939) (sustaining a statute prohibiting liquor importation from states which discriminated against local alcohol); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391, 59 S.Ct. 254, 83 L.Ed. 243 (1939) (upholding a retaliatory statute similar to that in McKittrick); Mahoney v. Joseph Triner Corp., 304 U.S. 401, 58 S.Ct. 952, 82 L.Ed. 1424 (1938) (upholding a statute forbidding alcohol importation without a registered trade

(Footnote continued)

in more recent decisions, the reach of the Twenty-First Amendment has been found to be finite, despite the substantial discretion retained by the states in regulating alcohol.<sup>15</sup> State regulations enacted pursuant to Twenty-First Amendment powers are presumed valid as long as the regulation is reasonable and is rationally related to the furtherance of legitimate state interests.<sup>16</sup> Moreover, the Court's

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name). But see Ziffrin, Inc. v. Reeves, 308 U.S. 132, 139, 60 S.Ct. 163, 167, 84 L.Ed. 128 (1939) (upholding Kentucky liquor regulations on the grounds of state police powers rather than heightened authority under the Twenty-First Amendment).

<sup>15</sup> California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980); Craig v. Boren, 429 U.S. 190, 206, 97 S.Ct. 451, 461, 50 L.Ed.2d 397 (1976); Castlewood International Corp. v. Miller, 626 F.2d 1200, 1200 (5th Cir. 1980); Dunagin v. City of Oxford, 489 F.Supp. 763, 772 (N.D.Miss.1980), appeal pending, No. 80-2762 (5th Cir. 1981).

<sup>16</sup> California v. LaRue, 409 U.S. 109, (Footnote continued)

decisions have confirmed that the "Amendment primarily created an exemption to the normal operation of the Commerce Clause . . ." so that once a court has "pass(ed) beyond consideration of the Commerce Clause, the relevance of the Twenty-First Amendment to other constitutional provisions become increasingly doubtful."<sup>17</sup>

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93 S.Ct. 390, 34 L.Ed.2d 342 (1972); Blatnik Co. v. Ketola, 587 F.2d 379, 382 (8th Cir. 1978); Richter v. Dept. of Alcoholic Beverage Control, 559 F.2d 1168, 1170 (9th Cir. 1977), cert. denied, 434 U.S. 1046, 98 S.Ct. 891, 54 L.Ed.2d 797 (1978); Woods v. Alcoholic Beverage Appeals Board, 502 F.Supp. 528, 531 (C.D.Calif.1980); Dunagin v. City of Oxford, 489 F.Supp. 763, 774 (N.D.Miss.1980), appeal pending, No. 80-2762 (5th Cir. 1981); DieBurg, Inc., v. Underhill, 465 F.Supp. 1176, 1177 (M.D.Fla.1979); Felix v. Milliken, 463 F.Supp. 1360, 1377 (E.D.Mich.1978).

<sup>17</sup>Craig v. Boren, 429 U.S. 190, 206, 97 S.Ct. 451, 461, 50 L.Ed.2d 397 (1976). See also, Blatnik, Inc. v. Ketola, 587 F.2d 379, 381 (8th Cir. 1978); Richter v. Dept. of Alcoholic Beverage Control, 559 F.2d 1168, 1171 (9th Cir. 1977), cert. denied, 434 U.S. 1046, 98 S.Ct. 891, 54 L.Ed.2d 797 (1978); Woods v. Alcoholic

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However, the 1980 case of California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 108-110, 100 S.Ct. 937, 945-946, 63 L.Ed.2d 233 (1980), detracts from this position, holding that the Twenty-First Amendment does not prevent operation of the Sherman Antitrust Act, even though the Act was adopted under the commerce power of Congress. Justice Powell, delivering the majority opinion, traced the judicial history of a state's regulatory power under the amendment but concluded that constitutional interests of the Federal government, particularly the Commerce Clause, are not abolished in the face of state liquor regulations.

These decisions demonstrate that there is no bright line between Federal and State powers over liquor. The Twenty-First Amendment grants the

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Beverage Appeals Board, 502 F.Supp. 528, 530 (C.D.Calif.1980); Dunagin v. City of Oxford, 489 F.Supp. 763, 772 (N.D.Miss.1980), appeal pending, No. 80-2762 (5th Cir. 1981).

states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the Federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a concrete case.

445 U.S. at 110, 100 S.Ct. at 946 (citing Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332, 84 S.Ct. 1293, 1298, 12 L.Ed.2d 350 (1964). The Court concluded that the federal interest in a competitive economy outweighed the unsubstantiated state interest in promoting temperance and the protection of small retailers through resale price maintenance. Accordingly, each constitutional provision must be read with the other in mind, and their application is necessarily

dependent upon "the issues and interests at stake in any concrete case."<sup>18</sup>

In California v. LaRue, 409 U.S. 109, 110, 93 S.Ct. 390, 393, 34 L.Ed.2d 342 (1972), the Supreme Court upheld a state liquor regulation which prohibited lewd sexual performances in establishment licensed by the state to serve liquor-by-the-drink. The Court found the state regulation to be a reasonable and rational exercise of its powers to preserve the health and morality of its citizens pursuant to the Twenty-First Amendment since the regulation was considered a restriction on the viewer's access to alcohol rather than a restriction of access to

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<sup>18</sup> Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332, 84 S.Ct. 1293, 1298, 12 L.Ed.2d 350 (1964). See Craig v. Boren, 429 U.S. 190, 206, 97 S.Ct. 451, 461, 50 L.Ed.2d 397 (1976); California v. LaRue, 409 U.S. 109, 115, 93 S.Ct. 390, 395, 34 L.Ed.2d 342 (1972).

a particular form of expression.<sup>19</sup> Therefore, First Amendment rights were deemed to be only indirectly related since nude dancing was not the subject of the prohibition, rather, the sale of alcohol.<sup>20</sup> The Court noted that a critical factor was that California had not forbidden these acts entirely but had merely proscribed such performances in establishments that it licenses to sell liquor.<sup>21</sup>

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<sup>19</sup>409 U.S. at 115, 93 S.Ct. at 395. See also, Richter v. Dept. of Alcoholic Beverage Control, 559 F.2d 1168, 1172 (9th Cir. 1977), cert. denied, 434 U.S. 1046, 98 S.Ct. 891, 54 L.Ed.2d 797 (1978).

<sup>20</sup>409 U.S. at 116, 93 S.Ct. at 396; Richter v. Dept. of Alcoholic Beverage Control, 559 F.2d at 1172.

<sup>21</sup>Compare Schad v. Borough of Mount Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (city ordinance which excluded all forms of live entertainment, including nude dancing, throughout the borough was held to be a violation of the First and Fourteenth Amendment; the First Amendment requires sufficient justification for the exclusion of a broad category of protected expression from the (Footnote continued)

This Court recognizes that any analysis of the interplay of Twenty-First Amendment powers and First Amendment rights begins with an examination of California v. LaRue. However, the LaRue decision should not be taken as giving the Twenty-First Amendment absolute superiority over the First Amendment. Internal limitations to the applicability of the case do exist. For instance, LaRue concerned only incidental infringement of partially protected speech<sup>22</sup> in furtherance of state licensing powers. The Court, considering the questionable

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permitted commercial uses) and New York Liquor Authority v. Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (the state's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where nude dancing occurs).

<sup>22</sup>At the time LaRue was decided, obscenity was defined by Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

communicative value of nude dancing, seems to have been more amenable to its limitation. Also, the ordinance in LaRue concerned the licensing of liquor establishments serving liquor-by-the-drink, clearly a legitimate state regulatory area. Furthermore, the existence of alternative forums for performance of nude dancing in establishments not serving liquor-by-the-drink is an important consideration in the Court's opinion. Therefore, all freedom of expression objections to the intrusion of Twenty-First Amendment regulations are not foreclosed, although curtailed, by the isolated facts of LaRue.

A subsequent case, Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), clarified the effect of the Fourteenth Amendment in light of the State's authority to control liquor. The Court sustained an equal protection claim to a liquor regulatory measure emphasizing that when individual rights were involved,

State police powers are to be sharply curtailed. Recognizing the limited impact of the Twenty-First Amendment, the Court stated that "(o)nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-First Amendment to other constitutional provisions becomes increasingly doubtful." The opinion of the Court indicates that infringements on protected speech and other fundamental rights will not be tolerated solely on the basis of enhanced state police powers pursuant to the Twenty-First Amendment.

The case sub judice requires that this Court consider Twenty-First Amendment powers of the state to regulate liquor advertising in light of First Amendment protections of commercial speech which is admittedly afforded less protection than

other forms of First Amendment activity.<sup>23</sup> The question now arises whether the improved status of commercial speech will limit state police powers under the Twenty-First Amendment.

The Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Commissioner of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), devised a four part analysis to be utilized in cases involving commercial speech to determine whether government regulation of commercial speech was

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<sup>23</sup>Only recently has commercial speech been deemed worthy of limited First Amendment protection. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). This particular variety of speech was deemed unworthy of First Amendment protection solely because of its economic implications. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); Central Hudson v. Public Service Comm'n, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

forbidden by the First Amendment. This case marks the emergence of commercial speech into the realm of clearly-defined First Amendment protection. The Court considered a First and Fourteenth Amendment challenge to a regulation of the Public Service Commission which completely banned promotional advertising by an electrical utility.<sup>24</sup> In announcing this intermediate level of protection, the Court clearly distinguished between the full measure of First Amendment protection afforded the expression of ideas and the lesser degree given commercial speech. The Court readily rejected the contention that the state had the complete power to suppress or regulate commercial speech in favor of an approach which considers the nature of the expression and the

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<sup>24</sup> Id. 447 U.S. at 559, 100 S.Ct. at 2347, 65 L.Ed.2d at 346.

government interests served by the regulation.<sup>25</sup> To ascertain the viability of a regulation restricting commercial speech, the opinion provides that the courts must examine the content of the communication in order to make a preliminary determination of whether the expression is protected by the First Amendment.<sup>26</sup> To be a protected expression, it must concern lawful activity and not be deceptive or misleading.<sup>27</sup> In formulating its decision, the Court reasoned that some accurate information is better than none at all and that people

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<sup>25</sup> Id. 447 U.S. at 561-62, 100 S.Ct. at 2349-50, 65 L.Ed.2d at 348-49. See also, High Ol' Times, Inc. v. Busbee, 456 F.Supp. 1035 (N.D. Ga. 1978), aff'd, 621 F.2d 141 (5th Cir. 1980) (per curiam) (drug-related material entitled to first amendment protection).

<sup>26</sup> Id. 447 U.S. at 566, 100 S.Ct. at 2351, 65 L.Ed.2d at 351.

<sup>27</sup> Id.

will discern their own best interests if they are well enough informed.<sup>28</sup> Therefore, forms of communication which are more likely to deceive than inform or which are related to an illegal activity are subject to regulation or suppression.<sup>29</sup> However, the state must also assert that it has a substantial interest in the matter which will be achieved by the restrictions on commercial speech.<sup>30</sup> These restrictions must directly advance the state interest involved and may not be sustained if it provides only ineffective or remote support for the state's purpose.<sup>31</sup> Additionally, the regulation must be the least restrictive method of accomplishing

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<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Id., 447 U.S. at 565, 100 S.Ct. at 2350, 65 L.Ed.2d at 350.

<sup>31</sup> Id.

the state's purpose.<sup>32</sup> Speech that poses no danger to the asserted state interest cannot be regulated.<sup>33</sup>

A subsequent case, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), presented the Court with situation appropriate for application of the newly devised commercial speech analysis announced in Central Hudson. This case involved the validity of a city ordinance which imposed substantial restrictions on the erection of outdoor advertising displays within the city for aesthetic and safety reasons. The effect of the ordinance was to permit on-site commercial advertising while prohibiting other commercial and non-commercial communications using fixed-structure signs. Plaintiffs, outdoor

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<sup>32</sup> Id.

<sup>33</sup> Id.

advertisers, sought review of the state court decision, arguing that the ordinance was facially invalid on First Amendment grounds and that the city's threatened destruction of the outdoor advertising business was prohibited by the Due Process Clause of the Fourteenth Amendment. Recognizing that commercial and noncommercial speech were afforded differing levels of protection, the Court held that the ordinance violated the First Amendment because of its ban on noncommercial communication while concluding that the ban on commercial speech was appropriate in light of Central Hudson. The Court reiterated the test in Central Hudson stating first that the protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation. Succinctly, the test provides that: (1) the First Amendment protects commercial speech only if that speech concerns lawful

activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no farther than necessary to accomplish the given objective. The ordinance easily passed all four tests. However, the Court was reluctant to approve a general ban on signs carrying noncommercial speech stating that if the city tolerated billboards at all, it could not choose to limit their content to commercial messages; the city could not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of non-commercial messages.

Metromedia, Inc., while reaffirming the well-established principle that commercial speech is consistently accorded a lesser degree of protection than non-

commercial speech, does little else. The Court did not expound on the extent of substantial interest a state must exhibit in order to justify a First Amendment restriction on commercial speech which the opinion in Central Hudson omitted. The city's interest in the protection of its populace and its surroundings was sufficient to satisfy the Court's test. The Court balked only because of the similar treatment afforded commercial and noncommercial speech. This Court is aware of the different treatment allotted commercial and noncommercial communications and finds this case to be of little assistance when probing the realm of First Amendment versus Twenty-First Amendment.

Cable-Com General, Inc., et al v.

Crisp, 81-290-W (W.D.Okl. Feb. 10,

1982),<sup>14</sup> involved First and Fourteenth Amendment challenges by holders of cable television franchises in Oklahoma against the Oklahoma Constitution and statutes prohibiting the advertisement of alcoholic beverages. Plaintiffs are prohibited by the Oklahoma laws from rebroadcasting alcoholic beverage advertisements which originate outside Oklahoma. The Court noted that plaintiffs could not feasibly block out these advertisements and that failure to carry out-of-state stations containing alcoholic commercials would place plaintiffs in violation of their franchises.

California v. LaRue, 409 U.S. 109, 114, 93 S.Ct. 390, 395, 34 L.Ed.2d 342

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<sup>14</sup>See also, Oklahoma Telecasters Ass'n, et al v. Crisp, No. CIV-81-439-W (W.D.Oklahoma Dec. 18, 1981) wherein the Oklahoma district court followed the same reasoning and reached the same conclusions as Cable-Com with regard to several Oklahoma telecasting companies.

(1972), was found to be distinguishable in that the state's interest in regulating licensed bars and taverns outweighed the public's interest in sexually explicit live entertainment, particularly since the state had not totally banned such performances. The Court noted that the plaintiffs here were prohibited from disseminating advertisement of something the public was already aware of and had ready access to in newspaper and magazine materials. Applying the four-part test in Central Hudson, the Court reasoned that although the state's interest in the health and welfare of its citizens was legitimate, the state had chosen an impermissible means to achieve its legitimate goal. The restriction on alcoholic advertising was found to be an indirect means of advancing the state's interest and was more extensive than necessary to serve the state's interests. The regulation was not one of time, place and

manner but a total prohibition of the dissemination of all information on the subject of alcoholic beverages. This Court is aware of the fact that in Oklahoma the sale of alcoholic beverages is lawful throughout the state, whereas, Mississippi adheres to the local option law. Therefore, the Oklahoma Court noted that "... there (was) no claim that the communications suppressed are either misleading or related to unlawful activity." This Court views the Oklahoma courts opinion worthy of consideration because of the recognition by that Court that the citizens of Oklahoma were receiving the suppressed information through other and numerous sources.

Defendants herein stress the fact that pursuant to Mississippi's local option law, the advertising of alcoholic beverages in those counties remaining "dry" creates an "unlawful activity" subject to suppression under Central Hudson.

However, in those counties choosing to remain dry, it is the sale or consumption of alcohol that is forbidden under Miss. Code Ann. Section 67-1-1 and not the advertisement thereof. The ban on the advertisement of alcoholic beverage is challenged herein and not the local option law. A county or judicial district may choose to prohibit the consumption of alcohol and make its sale or consumption an "unlawful activity." However, the advertisement thereof, if the ban is deemed unconstitutional, does not involve an "unlawful activity."

[2] The Mississippi statutes and the ABC Division regulations controlling and effectively prohibiting the advertisement of alcoholic beverages originated within this state must be scrutinized in light of the strictures of the Twenty-First and First Amendments. We begin our analysis presuming the validity of the state's ban on alcohol advertisements since the state

is duly authorized by the Twenty-First Amendment to control the importation, distribution and consumption of alcohol. We further presume the validity of the state's purpose in banning alcohol advertisements; the promotion of temperance. According to the dictates of Central Hudson, we conclude that the communications sought to be suppressed herein concern lawful activities and are not misleading. However, this Court has great difficulty concluding that the complete prohibition of alcohol advertising bears a rational relation to the furtherance of an admittedly legitimate state interest, or that it directly advances that interest, considering the convincing evidence produced at trial regarding the mechanical and physical impossibility the state encounters attempting to enforce a complete ban. Utilizing the four-part analysis in Central Hudson, this Court concludes that the commercial speech proscribed sub judice is entitled

to First Amendment protection since it does not involve an illegal activity<sup>15</sup> and has not been represented to be misleading. Although the Court concludes that the governmental interest asserted is substantial and legitimate, we also conclude that the method of regulation, a complete prohibition, practically, does little to directly advance the government's interest in promoting temperance. Defendants failed to produce concrete scientific evidence to substantiate their position that alcohol advertising artificially stimulates consumption thereof. Furthermore, all residents of Mississippi are saturated

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<sup>15</sup>An approach to the validity of the ban based on whether a county is "wet" or "dry" according to the Local Option Law appears unworkable to this Court because of the vast array of alcohol advertisements received from outside sources in those counties choosing to remain "dry." This Court cannot interpret "illegal activity" to have one meaning in one county and another meaning in the county adjacent to it.

with alcohol advertisements that are originated outside the state and distributed within the state. Accordingly,

"the state interest in temperance can be served through permissible time, place and manner restrictions on price information. The state may discourage the use of alcoholic beverages by choosing to ban their sale entirely or through taxes. The state cannot, however, completely suppress truthful information about this lawful product out of a paternalistic concern for the product's effect. The state's protectiveness cannot be based on maintaining public ignorance."<sup>6</sup>

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"The Tennessee Court was also confronted with a local option preference in Tennessee. The court easily disposed of this problem, to wit:

"The wholesalers next insist that the price information ban is justified because the information would promote transactions illegal in some Tennessee counties. This allegation is not supported by affidavits stating how information on liquor prices in a "wet" Tennessee county will spur illegal activities in another "dry" county. Citizens of "dry" counties are currently subjected daily to information about the availability of liquor in neighboring areas. Only information promoting a product which in itself is illegal, such as narcotics or prostitution, is denied

(Footnote continued)

Shirley, A. Wise, et al. v. Tennessee Alcoholic Beverage Comm'n, et al., Chancery Court for Davidson County, Part One, Nashville, Tenn., No. 81-325-I (July 30, 1981) at 5.

Plaintiffs further contend that the challenged statutes and regulations constitute a denial of equal protection of the law, guaranteed to them by the Fifth and Fourteenth Amendments. Plaintiffs argue that the selective enforcement of the statutory ban, combined with the artificial distinction created by ABC Regulation 6 between Mississippi and out of state media (prohibiting any person from "originating" advertisements for alcoholic

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(Footnote continued)

commercial speech protection. Pittsburg Press v. Pittsburg Comm'n on Human Rights, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973). Information on liquor for sale within a "dry" county would of coarse not be protected by the First Amendment." Shirley A. Wise, et al., No. 81-325-1 at 6.

beverages in the State of Mississippi), amount to a denial of equal protection. Essentially, Plaintiffs contend that the statutes and regulations, and their enforcement, create two distinct classes of advertisers. The first class, Plaintiffs allege, consists of the publishers of all national magazines, the publishers of large national and regional newspapers, the owners of all cable television facilities in Mississippi and elsewhere, the owners of out of state radio and television stations whose broadcasts are carried into Mississippi, the owners of outdoor advertising signs erected along the interstate entrances to Mississippi, and all other media advertisers who publish, originate, disseminate or broadcast alcoholic beverage advertisements into Mississippi from locations outside the State of Mississippi. This large group of advertisers is permitted to carry alcoholic beverage advertisements in

Mississippi. The smaller class consists of the limited number of Mississippi newspaper publishers, radio and television station owners and advertising companies which are physically located within the State of Mississippi. This class is prohibited from carrying alcoholic beverage advertisements. Plaintiffs maintain that this is an irrational and arbitrary classification in violation of their equal protection of the laws.

[3,4] Defendant rebuts Plaintiffs' argument, contending that under an equal protection analysis, unless a statutory classification infringes on "fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."

Friedman v. Rogers, 440 U.S. 1, 17, 99

S.Ct. 887, 898, 59 L.Ed.2d 100 (1979)

(quoting City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976)). Defendant submits that there is no suspect class or fundamental personal right which is infringed by the challenged statutes so that the "rational relation" test applies. By establishing the two classes, those persons, firms or corporation originating alcoholic beverages in this state and those originating advertisements outside this state, Defendant submits the Mississippi Legislature decided to control intrastate alcoholic beverage advertisements and not to control those coming into the state. Defendant maintains that this legislative decision is rationally related to its legitimate state interest; controlling the artificial stimulation of alcoholic beverage sales and consumption

"Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect

distinctions such as race, religion, or alienage, over decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."

Friedman v. Rogers, 440 U.S. 1, 17, 99

S.Ct. 887, 898, 59 L.Ed.2d 100 (1979)

(quoting New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976)). An allegedly discriminatory statute will not be overturned unless "... the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can conclude that the legislature's actions were irrational." Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 942, 59 L.Ed.2d 171 (1979). Although state legislatures are "accorded wide latitude in the regulation of their local economies under their police powers", New Orleans v. Dukes, 427 U.S. at 303, 96 S.Ct. at 2516, the legislative action must be "rationally related to the accomplish-

ment of a legitimate state interest."

Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1039 (5th Cir.), reh. en banc denied, 634 F.2d 1355 (5th Cir. 1980), reversed in part and remanded, \_\_\_\_ U.S. \_\_\_, 102 S.Ct. 1070, 71 L.Ed.2d 152. This test requires that the legislation constitute a means that is "reasonable, not arbitrary, and rests upon some ground of difference having a fair and substantial relation to the object of the legislation...." Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d at 1039.

[5] The proof at the trial of this cause revealed convincingly that the residents of the State of Mississippi are literally inundated with liquor advertisements from sources originating outside the state. This constant and ready access and exposure to advertisements of alcoholic beverages permeates "wet" and "dry" counties alike. Therefore, it is inconceivable to this Court how the Mississippi

Legislature proposed to justify the complete prohibition of alcoholic beverage advertisements from outside sources. Although we find the state's goal of promoting temperance legitimate and commendable, the means chosen to advance this cause bear no relation to this purpose. Plaintiff's expert produced substantial and convincing proof at trial regarding the lack of credible evidence, scientific or otherwise, which lends any support to the theoretical connection between an alcoholic beverage advertising ban and moderation in consumption of alcoholic beverages. Indeed, the defendant's expert admitted that he had conducted no investigation of this hypothesis in Mississippi. Moreover, the testing of a comparable ban on alcoholic beverage advertising in British Columbia was abandoned because of the constant influx of alcoholic beverage advertisements into British Columbia from outside sources.

Therefore, this Court concludes that the state's complete ban on alcoholic beverage advertising originating within this state in no way rationally furthers the state's interest in controlling the artificial stimulation of the sale and consumption of alcoholic beverages. This legislation has not been demonstrated to bear a fair and substantial relation to the legislative objective. Indeed, it operates only to penalize those groups desiring to disseminate such information when it originates within the state. As stated by the Fifth Circuit, "...(m)ere disapproval is not enough constitutionally to justify bringing the full weight of the (state's) regulatory apparatus into play ... (T)he supposed evil does not inhere in mere simultaneous presence." Aladdin's

Castle, Inc. v. City of Mesquite, 630 F.2d at 1040.<sup>17</sup>

An order in accordance with this opinion shall be submitted by the parties as provided by the local rules.

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<sup>17</sup>Plaintiffs also advance an allegation of denial of due process under the Fourteenth Amendment. The Court finds an analysis of the due process question unnecessary in light of the Court's holding on the equal protection claim since the standard of review for both allegations are the same. See, Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-25, 98 S.Ct. 2207, 2213-14, 57 L.Ed.2d 91 (1978); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976); Anderson v. Winter, 631 F.2d 1238, 1241 (5th Cir. 1981).

APPENDIX E  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT  
No. 82-4076  
D. C. Docket No. CA-J78-0472(R)

LAMAR OUTDOOR ADVERTISING, INC., et al.,  
Plaintiffs-Appellees,  
v.  
MISSISSIPPI STATE TAX COMMISSION, et al.,  
Defendants-Appellants.

Appeal from the United States  
District Court for the  
Southern District of Mississippi

Before CLARK, Chief Judge, BROWN,  
GOLDBERG, GEE, REAVLEY, POLITZ, RANDALL,  
TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY  
and HIGGINBOTHAM, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed by the Court en banc;

IT IS FURTHER ORDERED that Plaintiffs-Appellees pay to Defendants-Appellants the costs on appeal, to be taxed by the Clerk of this Court.

October 31, 1983

WILLIAMS, Circuit Judge, with whom, TATE, Circuit Judge, joins, specially concurring.

GEE, Circuit Judge, with whom GOLDBERG,  
POLITZ, RANDALL, and HIGGINBOTHAM,  
Circuit Judges, join, dissenting.

HIGGINBOTHAM; Circuit Judge, concurring  
in dissent of GEE, Circuit Judge.

ISSUED AS MANDATE: November 22, 1983.

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\*Judge Alvin B. Rubin recused himself and  
did not participate in this decision.

## APPENDIX F

CONSTITUTIONAL PROVISIONS AND  
STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Twenty-first Amendment to the Constitution of the United States provides:

"Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

Miss. Code Ann. § 67-1-3 (1972) provides:

The policy of this state is renounced in favor of prohibition of the manufacture, sale, distribution, possession and transportation of intoxicating liquor, and the provisions against such manufacture, sale, distribution, possession and transportation of intoxicating liquor, as contained in Chapter 31 of Title 97, Mississippi Code of 1972 and elsewhere, are hereby redeclared the law of this state. The purpose and intent of this chapter is to vigorously enforce the prohibition laws throughout the state, except in those counties voting themselves out from under the prohibition law in

accordance with the provisions of this chapter, and, in those counties, to require strict regulation and supervision of the manufacture, sale, distribution, possession and transportation of intoxicating liquor under a system of state licensing of manufacturers, wholesalers and retailers, which licenses shall be subject to revocation for violations of this chapter.

All laws and parts of laws in conflict with this chapter are repealed only to the extent of such conflict; however, except as is provided in this chapter, all laws prohibiting the manufacture, sale, distribution and possession of alcoholic beverages, which are not in conflict with this chapter shall remain in full force and effect, and all such laws shall remain in full force and effect in counties wherein the manufacture, sale, distribution and possession of alcoholic beverages has not been authorized as a result of an election held under section 67-1-11.

Miss. Code Ann. § 67-1-7 (Cum. Supp. 1972)

provides as follows:

Subject to all of the provisions and restrictions contained in this chapter, the manufacture, sale, distribution, possession and transportation of alcoholic beverages shall be lawful in those counties of this state in which, at a local option election called and held for that purpose under the provisions of this chapter, a majority of the qualified electors voting in such election shall vote in favor thereof.

However, the manufacture, sale and distribution of such alcoholic beverages shall not be permissible or lawful in such counties except in (a) incorporated municipalities located within such counties, (b) qualified resort areas within such counties approved as such by the state tax commission, or (c) clubs within such counties, whether within a municipality or not.

The manufacture, sale, distribution and possession of native wines shall be lawful in any location within any such county except those locations where the manufacture, sale or distribution is prohibited by law other than this section or by regulations of the commission.

Miss. Code Ann., § 67-1-19 (Cum. Supp.

1972) provides as follows:

The administration and enforcement of this chapter shall be vested in the state tax commission except as provided in section 67-1-23. There is hereby created the alcoholic beverage control division within and as a part of the state tax commission.

Miss. Code Ann., § 67-1-37(e) (1972) pro-

vides as follows:

(e) To issue rules prohibiting the advertising of alcoholic beverages in the state in any class of media and to provide further that all advertising of the retail price of alcoholic beverages shall be prohibited except on placards or signs in the interior of licensed premises

which are not visible from the exterior.

Miss. Code Ann. § 67-1-85 (1972) provides as follows:

No holder of a package retailer's permit shall have any sign, lighted or otherwise, or printing upon the outside of the premises covered by his permit advertising, announcing or advising of the sale of alcoholic beverages in or on said premises. However, on the front of said premises, there may be printed, in letters not more than eight inches high, the name of the business, the permit number thereof, which may be preceded by the words "A.B.C. Permit No.", and the words "Package Liquors Sold Here." In addition, no alcoholic beverages, price list or promotional matter shall be kept, stored or displayed in the windows or other openings of said premises. An open window space or spaces not exceeding sixty square feet in area in the aggregate, and an open space of not exceeding twenty square feet in a front door, may be left open to view. The commission shall have the power and authority to adopt and enforce reasonable rules and regulations to compel compliance with the provisions of this section.

It shall be unlawful to advertise alcoholic beverages by means of signs, billboards, or displays on or along any road, highway, street or building.

This section shall not be construed so as to prohibit the commission from promulgating rules and

regulations permitting the holder of an on-premises retailer's permit to include in signs located on the holder's premises and in advertisements of the holder's principal business, the word "lounge" or other similar words descriptive of the facilities available at such principal place of business, without referring specifically to alcoholic beverages.

Miss. Code Ann. § 67-1-87 (1972) provides as follows:

Any person convicted of a violation of any of the provisions of this chapter for which no other penalty is specifically provided herein, shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars (\$1,000.00), or by imprisonment for not more than six months, or by both such fine and imprisonment.

Miss. Code Ann. § 97-31-1 (1972) provides as follows:

It shall be unlawful for any person, firm, corporation or association, or any servant, official or employee thereof, (1) to advertise upon any street car, railroad car, or other vehicle of transportation, or at any public place or resort, or upon any sign or billboard, or by circulars, poster, price lists, newspapers, periodicals, or otherwise, within this state, alcoholic, intoxicating or spirituous liquors, or intoxicating bitters or other drinks which if drunk to excess, will produce

intoxication, including among others, brandy, whisky, rum, gin, ale and porter, or to advertise the manufacture, sale, keeping for sale or furnishing of any of them, or the person from whom, or the firm or corporation from which, or the place where, or the method by which same, or any of them, may be obtained; (2) to circulate, publish, sell, offer for sale, or expose for sale, any newspaper, periodical, or other written printed matter in which any advertisement specified in this section shall appear, or to permit any sign or billboard containing such advertisement to remain upon one's premises; or (3) to circulate any price list, order blanks, or other matter, for the purpose of inducing or securing orders for said liquors, bitters, and drinks, or any of them hereinbefore mentioned, no matter where located. Any sheriff, constable, or other police officer, is authorized to remove any such advertisement from any sign, billboard or other public place, when it comes to his notice, and shall do so upon demand of any citizen. Any advertisement or notice containing the picture of a distillery, bottle, keg, barrel or box, or other receptacle represented as containing any liquors, bitters or drinks mentioned or designed to serve as an advertisement thereof, shall be within the inhibition of this section.

Regulation No. 1 of the Alcoholic Beverage Commission of the State Tax Commission provides as follows:

Any person, firm, association, corporation, hotel, restaurant, or club as defined in the Local Option Alcoholic Beverage Control Law that shall violate any of the provisions of the said Law, or knowingly permit the violation of the said law upon its premises shall not be eligible to obtain any permit provided for in Section 67-1-51, Mississippi Code of 1972, Recompiled, for a period of twelve (12) months after the date of violation.

The Director of the Alcoholic Beverage Control Division is hereby empowered, authorized, and directed to carry out fully the provisions of this Regulation and Section 67-1-17, Mississippi Code of 1972, Recompiled.

Regulation No. 6 of the Alcoholic Beverage Commission of the State Tax Commission provides as follows:

No person, firm or corporation shall originate advertisement in this State, dealing with alcoholic beverages by any means whatsoever, including but not limited to newspapers, radio, television, circular, dodger, word of mouth, signs, billboards, displays or any other advertising media, except as follows:

- (1) On the front of any licensed retail package store building, and no

higher than the top of the roof of the permitted place of business at its highest point, there may be printed without illumination, in letters not more than eight (8) inches high, the name of the business, the permit number thereof, which may be preceded by the words "A.B.C. Permit No. \_\_\_\_\_", and the words "Package Liquor Sold Here". Where the package retail store is located in a building of more than one story in height, the top of such sign shall not be higher than the top of the first story.

(2) A package retail permittee may advertise merchandise inside the permitted place of business by means of a display or displays, signs or placards, or notices, without special illumination. No displays, signs, placards or notices will be permitted in windows. No displays, signs, placards, notices, shelves, counters, or other fixtures shall be constructed or arranged in such a manner as to attract attention from outside the building.

(3) The holder of an on-premises retailer's permit may use the word "lounge" or other similar words descriptive of the facilities available at the permittee's principal place of business, in letters not more than eight (8) inches high and without special illumination, on signs located on the permittee's premises. The use of the word "lounge", but no other words of a similar nature, will be permitted on billboards in letters not more than eight (8) inches high.

(4) In other advertising media, an on-premises permittee may use the word "lounge", but no other words of a similar nature, including, specifically, but not limited to "cocktails", "bar", and "happy hour". The word "lounge" must be subordinated by restaurants to advertising placed for the other facilities offered at the place of business.

(5) All advertising not specifically permitted by statute or regulation is prohibited. Advertising of any type whatsoever about which a permittee may be in doubt should be submitted to the State Tax Commission for approval.

Regulation No. 36 of the Alcoholic Beverage Commission of the State Tax Commission provides, in pertinent part, as follows:

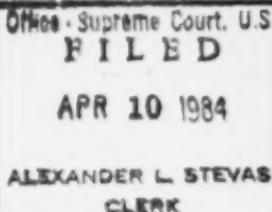
#### PROCEDURES FOR LISTING ALCOHOLIC BEVERAGE ITEMS

Items shall be added to the Alcoholic Beverage Control Division price list on the following basis:

Brands will be considered upon applications transmitted by suppliers. Such applications shall reflect sales to other control states, sales in adjoining states and a guarantee that in the event the item does not sell in a satisfactory quantity during the first year of listing it will be removed.

The Commission may, in its discretion, delist any sizes or brands regardless of the sales volume performance of such items when in its opinion the best interest of the Alcoholic Beverage Control Division may be served. However, those items the sales of which are in the bottom one-third of all brands will be especially considered for delisting.

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NO. 83-1221  
NO. 83-1244

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

KATHY DUNAGIN, ET AL.,  
Petitioners

v.

CITY OF OXFORD, MISSISSIPPI, ET AL.,  
Respondents

LAMAR OUTDOOR ADVERTISING, INC., ET AL.,  
Petitioners

v.

MISSISSIPPI STATE TAX COMMISSION, ET AL.,  
Respondents

ON PETITIONS FOR WRITS OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are laws of the State of Mississippi, which prevent media advertisers located within the State from originating liquor advertisements in Mississippi and which were enacted pursuant to the State's legitimate and substantial interest in controlling the artificial stimulation of liquor sales and consumption created by the advertisement of liquor and its police power to control liquor within its borders, augmented by the Twenty-first Amendment, constitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment?

## TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iv
STATEMENT OF THE CASE .....	1
I. The Challenged Mississippi Liquor Advertising Laws ....	1
II. <u>Lamar</u> District Court Proceedings .....	11
III. <u>Dunagin</u> District Court Proceedings .....	13
IV. Consolidated Proceedings In The Court Of Appeals ....	18
REASONS FOR DENYING THE WRITS ...	24
I. Contrary to the Petitioners' Contentions, the Fifth Circuit Did Not Alter the Standard of Review or Shift the Burden of Proof Regarding the Constitutionality of the Challenged Mississippi Liquor Advertising Laws, But Applied the <u>Central Hudson</u> Standard in Harmony With the Analogous Commercial Speech Decisions of this Court .....	24

II.	Contrary to the <u>Lamar</u> Petitioners' Contention, The Fifth Circuit Did Not Deny Them Standing to Assert an Equal Protection Challenge and Followed the Decisions of this Court in Refusing to Adopt a Strict Scrutiny Standard of Review for Commercial Speech Under the Equal Protection Clause .....	48
III.	The Granting of Certiorari to Review <u>Capital Cities</u> <u>Cable, Inc. v. Crisp</u> , No. 82-1795, Does Not Support the Granting of Certiorari to Review the Instant Cases ..	56
IV.	CONCLUSION .....	59

## CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<u>Bigelow v. Virginia</u> , 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed. 2d 600 (1975) .....	44, 45
<u>Bolger v. Youngs Drug Products</u> Corp., U.S. ___, 103 S.Ct. 2875, 77 L.Ed. 2d 469 (1983) .....	20, 21, 28, 52,
<u>California v. LaRue</u> , 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed. 2d 342 (1972) .....	21
<u>Castlewood International Corp.</u> v. <u>Simon</u> , 546 F.2d 638 (5th Cir. 1979), vacated and remanded, 446 U.S. 949, 100 S.Ct. 2914, 64 L.Ed. 2d 806 (1980), <u>panel opinion</u> reinstated, 626 F.2d 1200 (5th Cir. 1980).....	22
<u>Capital Cities Cable, Inc. v.</u> <u>Crisp</u> , U.S. ___, 104 S.Ct. 56, 57 66, 77 L.Ed. 2d ____ (1983) .....	58, 59
<u>Central Hudson Gas &amp; Electric</u> Corp. v. <u>Public Service</u> <u>Commission of New York</u> , 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980) .....	20, 21, 25, 26, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 40, 41, 42, 44, 47, 48
<u>Droe v. Missouri</u> , 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed. 2d 103 (1975) .....	40

<u>Dunaqin v. City of Oxford</u> , 489 F. Supp. 763 (N.D. Miss. 1980), <u>aff'd</u> , 718 F.2d 738 (5th Cir. 1983)(en banc)..	14, 16
<u>Dunagin v. City of Oxford</u> , 718 F.2d 738 (5th Cir. 1983) (en banc) .....	Passim
<u>Fortin v. Darlington Little League, Inc.</u> , 514 F.2d 344 (1st Cir. 1975) .....	39
<u>Metromedia, Inc. v. City of San Diego</u> , 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed. 2d 800 (1981)..	36, 37, 38, 40, 46, 49, 51, 52
<u>National Labor Relations Board v. Pittsburg Steamship Co.</u> , 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed 479 (1951) .....	30, 31
<u>New York State Liquor Authority v. Bellanca</u> , 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed. 2d 357 (1981) .....	21, 26, 27
<u>Ohralik v. Ohio State Bar Association</u> , 436 U.S. 437, 98 S.Ct. 1912, 56 L.Ed. 2d 454 (1978) .....	39
<u>Oklahoma Telecasters Association v. Crisp</u> , 699 F.2d 490 (10th Cir.), <u>cert. granted sub nom.</u> , <u>Capital Cities Cable, Inc. v. Crisp</u> , U.S. ___, 104 S.Ct. 66, 77 L.Ed. 2d ____ (1983) ..	19, 57
<u>Packer Corp. v. Utah</u> , 285 U.S. 105, 52 S.Ct. 273, 76 L.Ed 643 (1932) .....	55

<u>Premier-Pabst Sales Co. v. State</u>	
<u>Board of Equalization</u> , 13	
F. Supp. 90 (S.D.Cal. 1935)	
(three-judge court) .....	27
<u>Queensgate Investment Co. v.</u>	
<u>Liquor Control Commission</u> ,	
69 Ohio St. 2d 361, 433 N.E.2d	
138, <u>appeal dismissed</u> , U.S.	
, 103 S.Ct. 31, 74 L.Ed. 2d	21, 22,
45 (1982) .....	60
<u>Rice v. Sioux City Memorial</u>	
<u>Park Cemetery, Inc.</u> , 349 U.S.	
70, 75 S.Ct. 614, 99 L.Ed. 897	31, 47,
(1955) .....	59
<u>Virginia State Board of Pharmacy</u>	
<u>v. Virginia Citizens Consumer</u>	
<u>Council, Inc.</u> , 425 U.S. 748,	
96 S.Ct. 1817, 48 L.Ed. 2d 346	
(1976) .....	45
<u>Ziffrin v. Reeves</u> , 308 U.S. 132,	
60 S.Ct. 163, 84 L.Ed. 128	
(1939) .....	27

#### CONSTITUTIONAL PROVISIONS:

Constitution of the United States of America	
First Amendment .....	passim
Fourteenth Amendment .....	passim
Twenty-First Amendment .....	passim

#### STATUTORY PROVISIONS:

Miss. Code Ann. § 67-1-3 (1972).	2, 3, 7
Miss. Code Ann. § 67-1-5 (1972 and Supp. 1983) .....	1

Miss. Code Ann. § 67-1-7 (1972)	4
Miss. Code Ann. § 67-1-11 (1972)	3
Miss. Code Ann. § 67-1-13 (1972)	3
Miss. Code Ann. § 67-1-15 (1972)	3
Miss. Code Ann. § 67-1-37(e) (1972)	6, 9
Miss. Code Ann. § 67-1-85 (1972)	5, 6
Miss. Code Ann. § 97-31-1 (1972)	7, 16, 17
28 U.S.C. § 1331 .....	12, 15
28 U.S.C. § 1343 .....	12, 15
28 U.S.C. § 2201 .....	12
28 U.S.C. § 2202 .....	12
42 U.S.C. § 1983 .....	12, 15
42 U.S.C. § 1988 .....	15

REGULATIONS:

Alcoholic Beverage Control	
Regulation No. 6 .....	6, 9, 10, 11
47 C.F.R. § 76.55 (1982) .....	59

SESSION LAWS:

1934 Miss. Laws Ch. 172 .....	16
-------------------------------	----

JOURNALS:

Journal of The Mississippi State House of Representatives .....	5
--	---

OTHERS:

SA Moore, <u>Federal Practice</u> ¶ 52.03[2] (1983) .....	41
Nowak, Rotunda & Young, <u>Handbook</u> <u>on Constitutional Law</u> (1978) ...	54

## STATEMENT OF THE CASE

### I. The Challenged Mississippi Liquor Advertising Laws

The Mississippi liquor advertising statutes and regulations that are being challenged in Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission ("Lamar"), No. 83-1224, and Dunagin v. City of Oxford ("Dunagin"), No. 83-1221, are an integral part of Mississippi's comprehensive regulatory scheme for controlling liquor<sup>1/</sup> within its borders, known as the Local Option Alcoholic Beverage Control Law ("Local Option Law"), enacted in 1966. This act is the product of an historic compromise among several competing economic and political

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<sup>1/</sup> "Liquor," as used in this Brief, means distilled spirits and wine above 4% alcohol by weight. See Miss. Code Ann. § 67-1-5 (Supp. 1983).

factions within Mississippi, which gave individual counties and judicial districts the opportunity to end the dichotomy between de jure statewide prohibition of liquor, which had been in effect for 58 years, and the illegal de facto availability of liquor.

The Local Option Law makes it clear that prohibition of liquor remains Mississippi's overriding policy and the central purpose of the legislation:

The policy of this state is reannounced in favor of prohibition of the manufacture, sale, distribution, possession, and transportation of intoxicating liquor.... The purpose and intent of this chapter is to vigorously enforce the prohibition laws throughout the state, except in those counties voting themselves out from under the prohibition law in accordance with the provisions of this chapter, and, in those counties, to require strict regulation and supervision of

the manufacture, sale, distribution, possession and transportation of intoxicating liquor....

Miss. Code Ann. § 67-1-3 (1972)

(emphasis added).

The Local Option Law allows a county, or a judicial district within a county, to bring itself out from under statewide prohibition by an affirmative majority vote of the electors within the county or judicial district. Miss. Code Ann. § 67-1-11, -13 & -15 (1972). If the county or judicial district vote rejects coming out from under prohibition, or if an election is not held, the statewide prohibition laws remain in force and all aspects of liquor continue to be prohibited within that county or judicial district. If a county or judicial district votes itself

out from under the statewide prohibition, then, subject to all of the "provisions and restrictions" of the Local Option Law, the "possession and transportation" of liquor is legal throughout the county or judicial district while the "manufacture, sale, and distribution" of liquor is lawful, but only within the incorporated municipalities, qualified resort areas, and clubs of the county or judicial district as opposed to the county as a whole.

Miss. Code Ann. § 67-1-7 (1972).

At the time of the Lamar trial, thirty-five "dry" Mississippi counties and four judicial districts in four other counties had not voted to legalize liquor while forty-three "wet" counties and four judicial districts in

four other counties had voted to legalize liquor to the extent permitted by the Local Option Law. Lamar R. Vol. IV, pp. 134, 135; Trial Exh. D-5.

During consideration of the Local Option Law legislation by the Mississippi House of Representatives in 1966, more than 30 amendments were offered on the floor of the House. Amendment No. 24 amended Section 31 of the bill by adding a new paragraph which read as follows:

"It shall be unlawful to advertise alcoholic beverages by means of signs, billboards, or displays on or along any road, highway, street, or building."

Journal of the Mississippi State House of Representatives, 1966, p. 765. The amendment was incorporated as the second paragraph of Miss. Code Ann. § 67-1-85

(1972). Amendment No. 25 amended subsection (5) of Section 16 of the local option bill and read as follows:

(5) To issue Rules prohibiting the advertising of alcoholic beverages in the State in any class of media and to provide further that all advertising of the retail price of alcoholic beverages shall be prohibited except on placards or signs in the interior of licensed premises which are not visible from the exterior.

Id. This amendment language is presently codified as subsection (e) of Miss. Code Ann. § 67-1-37 (1972). These two provisions, Miss. Code Ann. § 67-1-85 and 67-1-37(e) (1972), along with Regulation No. 6 of the Alcoholic Beverage Control Division of the Mississippi State Tax Commission, promulgated pursuant to Section 67-1-37(e), are the operative

statutes and regulations challenged in Lamar and Dunagin.<sup>2/</sup> The specific adoption of these provisions as amendments is explicit evidence of legislative intent to weave the control of liquor advertising into the compromise scheme of balancing prohibition with "strict regulation and supervision of the manufacture, sale, distribution, possession and transport of intoxicating liquor."

Miss. Code Ann. § 67-1-3 (1972).

The importance of the liquor advertising statutes to the eventual passage of the Local Option Law was confirmed

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<sup>2/</sup> The Dunagin Petitioners expressly challenge only Miss. Code Ann. § 97-31-1 (1972), a statute which predates the Local Option Law and which has been limited in scope to the provisions of the Local Option Law. See Miss. Code Ann. § 67-1-3 (1972).

and underscored by the testimony of Robert L. Livingston, former Director of the Alcoholic Beverage Control Division of the Mississippi State Tax Commission, in the Lamar trial. Mr. Livingston testified in pertinent part as follows:

Q (Resuming) Mr. Livingston, specifically now with regard to the provisions of the Alcohol Beverage Control Law that are attacked in this lawsuit, the advertising provisions, what were the origins of those provisions in the 1966 legislative session?

. . .

A The origins, or the idea behind these provisions was one of strict control, that if Mississippi was ever to join the rest of the nation as a state with legalized liquor, we had to show the people that it would be possible to control it and handle it to their satisfaction so that there would be neither promotion nor encouragement of what

was a controversial subject at that time and what still is.

• • •

Q (Resuming) Mr. Livingston, what was the purpose of the alcoholic beverage advertising provisions of the Local Option Law?

• • •

A I think that it is important to know that we wouldn't have legal alcohol in the State of Mississippi today if there had not been severe controls and restrictions placed on the field of advertising.

Lamar R. Vol. IV at pp. 127,

128, 129 (emphasis added).

After passage of the Local Option Law, the Mississippi State Tax Commission implemented Miss. Code Ann. § 67-1-37(e) (1972) by promulgating its Regulation No. 6, which provides:

[N]o person, firm or corporation shall originate advertisement in this State, dealing with alcoholic beverages by any means whatsoever, including but not limited to newspapers, radio, television, circular, dodger, word of mouth, signs, billboards, displays or any other advertising media....  
(emphasis added)

The State Tax Commission has interpreted the words, "originate advertisement in this State," in Regulation No. 6 to mean that the central place of publication or dissemination of the liquor advertisements must be within the physical boundaries of the State of Mississippi in order for Regulation No. 6 and the other challenged statutes and regulations to apply. Lamar R. Vol. J., pp. 166-167. Thus, the operative Mississippi laws challenged herein ban only in-state liquor advertising - those advertisements of liquor physically

originating in the State of  
Mississippi.<sup>3/</sup>

II. Lamar District Court Proceedings

The 56 Lamar Petitioners, consisting of outdoor advertisers and print and electronic media advertisers, filed this action in the United States District Court for the Southern District of Mississippi, Jackson Division, on November 1, 1978. This action was filed in order to challenge the Mississippi statutes and regulations banning liquor advertisements which originate within the State of Mississippi on the basis that such statutes and regulations

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3/ Regulation No. 6 does allows the advertisement of liquor within the confines of the state licensed retail package stores as a means of providing consumer information at the point of sale.

constitute an abridgement of commercial speech and a denial of equal protection under the law in violation of the First and Fourteenth Amendments.

Petitioners sought a declaratory judgment that the challenged statutes and regulations were unconstitutional and a prohibitory injunction enjoining the Respondents from attempting to enforce them.

Federal jurisdiction was invoked under 28 U.S.C. §§ 2201, 2202, 1331 and 1343 and 42 U.S.C. § 1983.

In 1979 both Petitioners and Respondents moved for summary judgment. Both motions were denied. The case was then tried before the district court, sitting without a jury, on March 11-12, 1981. The opinion of the district court, which

appears as Appendix D to the Lamar Petition, held that Mississippi's ban on intrastate liquor advertising violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, since the ban "in no way rationally furthers the state's interest in controlling the artificial stimulation of the sale and consumption of alcoholic beverages." 539 F. Supp. 830-31, App. C at 221a. The Respondents appealed to the United States Court of Appeals for the Fifth Circuit.

III. Dunagin District Court Proceedings

The Dunagin Petitioners in this case are the certified class of past, present and future editors and business managers of the Daily Mississippian, a student-

operated newspaper at the University of Mississippi in Oxford, Mississippi. After the Daily Mississippian ran beer advertisements, an Oxford city policeman visited the offices of the Daily Mississippian and advised the editor that the paper should cease advertising beer because state law prohibited it. On April 1, 1979, Petitioners received from Gerald Gafford, as attorney for Respondent City of Oxford, a letter dated March 29, 1979. The letter stated that "[t]his is a request that you consider the adoption of a policy which would eliminate the advertisement of intoxicating beverages in your paper." Dunagin v. City of Oxford, 489 F. Supp. 763, 766 (N.D. Miss. 1980). The Petitioners responded by filing suit in the United States

District Court for the Northern District of Mississippi on June 7, 1979, seeking injunctive relief against the City, a declaration that the statute was unconstitutional, certification as a class action, and attorney's fees pursuant to 42 U.S.C. § 1988. The Petitioners invoked the court jurisdiction under 28 U.S.C. §§ 1331 and 1343(3) for a cause of action under 42 U.S.C. § 1983.

On June 27, 1979, the Respondent State of Mississippi moved to intervene as a defendant and this motion was granted on June 29, 1979. Also on June 29th, the City of Oxford stipulated ex parte that it would not instigate legal proceedings pending the outcome of the district court action.

On July 3, 1979, the City of Oxford

filed its answer in which it contended that Miss. Code Ann. § 97-31-1 (1972) prohibits beer advertisements. The State of Mississippi, however, contended in a summary judgment motion that the statute did not prohibit beer advertisements and on that basis claimed that there was no case or controversy and moved for dismissal. The district court granted the State's summary judgment motion on January 10, 1980, holding that beer advertising is not restricted in Mississippi,<sup>4/</sup> although Petitioners were allowed to amend their complaint to specifically allege an intent to challenge the statute as it prohibited liquor

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4/ Dunagin v. City of Oxford, 489 F. Supp. 763, 767, n.4 (N.D. Miss. 1980). See 1934 Miss. Laws Ch. 172 (amending Miss. Code Ann. § 97-31-1 (1972) to permit beer advertising).

advertisements. The amended complaint was filed on January 23, 1980.

On February 27, 1980, the district court granted Petitioners' motion for class certification and certified a plaintiff class of all past, present, and future students elected or appointed to an editorial or business manager position with the Daily Mississippian.

On May 2, 1980, the district court entered summary judgment for the Respondents, declaring Miss. Code Ann. § 97-31-1 (1972) to be constitutionally valid under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. From this order, the previous order dismissing the suit for lack of case or controversy, and the order denying Petitioners an award

of attorney's fees, the Petitioners appealed to the United States Court of Appeals for the Fifth Circuit.

IV. Consolidated Proceedings in the Court of Appeals

On appeal to the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"), Lamar and Dunagin were consolidated after the submission of Dunagin to a panel of the Court was vacated due to the death of one of the panel members. A panel of the Court of Appeals heard the consolidated appeal and decided that the challenged laws and regulations were an unconstitutional restriction of commercial speech but did not resolve the issue of whether the restriction also violated the Equal Protection Clause. 701 F.2d at 334 n.29, App. B at 158a, n.29.

Before delivery of the panel opinion, the United States Court of Appeals for the Tenth Circuit issued a conflicting opinion<sup>5/</sup> upholding an Oklahoma law which banned all liquor advertisements originating in the intrastate and interstate commerce against a First Amendment challenge by cable television companies. Pursuant to the rules of the Fifth Circuit governing the issuance of opinions in conflict with a decision of another circuit, a rehearing en banc was ordered, and the panel opinion was vacated.<sup>6/</sup>

The en banc Court concluded that the

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<sup>5/</sup> Oklahoma Telecasters Ass'n. v. Crisp, 699 F.2d 490 (10th Cir.), cert. granted sub. nom., Capital Cities Cable, Inc. v. Crisp, U.S. \_\_\_, 104 S.Ct. 66, 77 L.Ed. 2d \_\_\_\_ (1983).

<sup>6/</sup> 718 F.2d at 315, n.2, App. A at 3a, n.2.

Mississippi regulatory scheme violated neither the First Amendment nor the Equal Protection Clause of the Fourteenth Amendment, reversed the judgment of the Lamar district court and upheld the judgment of the Dunagin district court. Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983) (en banc); Lamar App. A at 1a-72a; Dunagin App. at 1-85.

The Court of Appeals ruled that "[w]e base our decision, ultimately, upon the application of the Supreme Court's analysis in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980)," and acknowledged that this Court's recent commercial speech decision, Bolger v. Youngs Drug Products Corp., \_\_\_\_ U.S.

\_\_\_\_\_, 103 S.Ct. 2875, 2882, 77 L.Ed. 2d 469 (1983), "reaffirmed the Central Hudson Gas test as the basic method of deciding commercial speech cases." 718 F.2d at 747, 748. Analyzing the challenged Mississippi liquor advertising laws under the four elements of the Central Hudson test, the Court of Appeals held that such laws did not violate the Petitioners' alleged First Amendment rights. See 718 F.2d at 747-751; Lamar App. A at 33a-53a; Dunagin App. at 42-64.

Although not relied on as the basis for the Court's First Amendment analysis, California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed. 2d 342 (1972), New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed. 2d 357 (1981), and Queensgate

Investment Co. v. Liquor Control  
Commission, 69 Ohio St. 2d 361, 433  
N.E.2d 138, appeal dismissed, \_\_\_\_ U.S.  
\_\_\_\_, 103 S.Ct. 31, 74 L.Ed. 2d 45  
(1982), were discussed by the Court as  
providing "an added presumption of  
validity" for state liquor regulations,  
consistent with its previous ruling in  
Castlewood International Corp. v.  
Simon.<sup>7/</sup> 718 F.2d at 746, 750, Lamar  
App. A at 47a-48a; Dunagin App. at 58.

In ruling on the Lamar Petitioners'  
equal protection claim, the Fifth  
Circuit rejected the applicability of  
the strict scrutiny standard of review.  
The Court held that (1) there can be no

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<sup>7/</sup> 546 F.2d 638 (5th Cir. 1979),  
vacated and remanded, 446 U.S. 949,  
100 S.Ct. 2914, 64 L.Ed. 2d 806  
(1980), panel opinion reinstated,  
626 F.2d 1200 (5th Cir. 1980).

infringement of a fundamental right since the Court found that no First Amendment rights were violated and (2) commercial speech, in contrast to ideological speech, is entitled to only a "limited measure of protection" under the First Amendment. Additionally, the Court found that in-state and out-of-state advertisers are not similarly situated classes. The Court ultimately held that the Mississippi liquor advertising laws do not violate the Equal Protection Clause under the rational basis standard of review. 718 F.2d at 752, 753; Lamar App. A at 58a-61a; Dunagin App. at 70-73.

REASONS FOR DENYING THE WRITS

It is undisputed that the Fifth Circuit's en banc decision presents no conflict with the decision of any other court of appeals. This Brief will demonstrate that the Lamar and Dunagin Petitions establish no conflict with the applicable decisions of this Court and present no important questions of federal law which should be settled by this Court.

- I. Contrary to the Petitioners' Contentions, the Fifth Circuit Did Not Alter the Standard of Review or Shift the Burden of Proof Regarding the Constitutionality of the Challenged Mississippi Liquor Advertising Laws, But Applied the Central Hudson Standard in Harmony With the Analogous Commercial Speech Decisions of this Court.

The Lamar and Dunagin Petitioners (collectively referred to as "the Petitioners") request this Court to review the Fifth Circuit en banc deci-

sion because they claim the decision alters the standard of review and shifts the burden of proof which would otherwise apply to commercial speech restrictions. Specifically, the Petitioners claim that the Fifth Circuit analyzed the constitutionality of the challenged Mississippi liquor advertising laws under the deferential rational basis standard of review rather than the four-part test<sup>8/</sup> for commercial speech set

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8/ This four-part test is summarized as follows: (1) the expression must be related to illegal activity and must not be misleading; (2) the asserted governmental interest must be substantial; (3) the regulation must directly advance the asserted governmental interest asserted; and (4) the regulation must be no more extensive than necessary to serve that interest. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed. 2d 341, 351 (1980).

forth in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980). Lamar Petition at 10, 14; Dunagin Petition at 15.

Although the Respondents vigorously submit that the Fifth Circuit should have applied the rational basis test standard of review due to the state's police power over liquor within its borders, augmented by the Twenty-first Amendment,<sup>9/</sup> the Court did not do

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9/ A full discussion of this important issue is not necessary to the purpose of this Brief since the Court applied the Central Hudson standard. However, Respondents point out that no one disputes that a state may maintain a complete prohibition of all incidents of liquor pursuant to its police power. E.g., New York State Liquor Authority v. Bellanca, 452 U.S. 714, 715, 101 S.Ct. 2599, 2600, 69 L.Ed. 2d 357, 360 (1981). Therefore, the State's authority to completely prohibit liquor alto-

so. Thus, Petitioners present no basis for certiorari review.

The Fifth Circuit expressly held in its en banc decision that "[w]e base our

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gether necessarily provides it the lesser included power to condition the availability of liquor on the absence of advertising. See Ziffrin v. Reeves, 308 U.S. 132, 138, 60 S.Ct. 163, 167, 84 L.Ed. 128, 135 (1939); Premier-Pabst Sales Co. v. State Board of Equalization, 13 F. Supp. 90, 95-96 (S.D. Cal. 1935) (three-judge court). This is particularly true in Mississippi where part of the quid pro quo for legalization of liquor sales and consumption was the absence of advertising. This police power is augmented by the Twenty-first Amendment, as this Court held in Bellanca and other decisions. Furthermore, Bellanca made it clear that, in conflicts between a lower protected form of speech, such as nude dancing and commercial advertising, and a state's authority to control liquor, the rational basis standard is applicable. Under this minimum scrutiny, the challenged Mississippi laws are clearly constitutional.

decision, ultimately, upon the application of the Supreme Court's analysis in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York [citation omitted]." 718 F.2d at 746-747; Lamar App. A at 32a; Dunagin App. at 41. This standard of review was acknowledged by the Court of Appeals "as the basis method of deciding commercial speech cases," citing Bolger v. Youngs Drug Products Corp., \_\_\_\_ U.S. \_\_\_\_, 103 S.Ct. 2875, 77 L.Ed. 2d 469 (1983). 718 F.2d at 747; Lamar App. A at 33a; Dunagin App. at 41-42. The Fifth Circuit analyzed the challenged Mississippi laws under each of the four elements of the Central Hudson test and correctly found that these laws pass constitutional muster despite the

Petitioners' claims of First Amendment protection.

Since it is evident that the Fifth Circuit utilized the Central Hudson commercial speech test in reaching its conclusion that the Mississippi laws are constitutional, the Petitioners are reduced to claiming that the Fifth Circuit misapplied the Central Hudson standard. The Lamar Petitioners concede that merely the misapplication of the Central Hudson test would not merit this Court's exercise of certiorari review:

If the proper standard of review for restrictions on truthful advertising of legally available products had merely been misapplied, then the error committed by the Fifth Circuit in upholding, as constitutional, Mississippi's ban on liquor advertising might not merit this Court's attention.

Lamar Petition at 10,11. Thus, the Lamar Petitioners acknowledged that the misapplication of the Central Hudson test to the facts of these cases would represent neither a conflict with the decisions of this Court nor a sufficiently important question for this Court to review. This is a correct assessment. Such a review would involve primarily the interests of the parties under the specific provisions of the Mississippi liquor advertising laws. This Court has held that its certiorari jurisdiction will be exercised to review only those cases which involve "principles, the settlement of which are of importance to the public as distinguished from that of the parties." National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 502, 71

S.Ct. 453, 456, 95 L.Ed. 479, 482 (1951). Accord, Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897, 901 (1955) (This Court will not grant certiorari to review a case "for the benefit of the parties litigant."). Thus, this Court should not issue a writ of certiorari to review the Fifth Circuit's decision that the challenged Mississippi laws pass muster under the Central Hudson commercial speech test.

The Petitioners also improperly argue that the Fifth Circuit misapplied the Central Hudson test to the facts of these cases. Although this argument does not present a legitimate issue for certiorari review, this Brief will demonstrate that the Fifth Circuit's en banc decision correctly applied the ele-

ments of the Central Hudson test that are contested by the Petitioners and followed the reasoning of analogous commercial speech decisions of this Court in doing so.

The Fifth Circuit first held that liquor advertisements in Mississippi "should be treated at the outset as protected commercial speech." 718 F.2d at 747; Lamar App. A at 33a; Dunagin App. at 42. Under this threshold element of the Central Hudson test, the Fifth Circuit disagreed with Respondents in holding that the liquor advertisements sought to be disseminated by Petitioners are not related to illegal activity and are not misleading. 718 F.2d at 742, 743;<sup>10/</sup> Lamar App. A at 15a-19a; Dunagin App. at 21-25.

The Court of Appeals next confirmed that "[t]here can be no question ... that Mississippi does assert a substantial interest, which the state describes to be 'safeguarding the health, safety and general welfare of its citizens by controlling the artificial stimulation of liquor sales and consumption created by the advertising of liquor.'" 718 F.2d at 747; Lamar App. A at 33a-34a;

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10/ A discussion of this aspect of the Court's decision is unnecessary to the purpose of this Brief. However, Respondents continue to vigorously assert that Petitioners' liquor advertisements are not entitled to further analysis under the remaining Central Hudson elements because these advertisements are related to illegal activity in Mississippi, half the counties of which are "dry," and are inherently misleading, providing no information regarding the undisputed dangers of alcohol consumption.

Dunagin App. at 42.11/ As evidence of the substantial nature of the State's interest, the Court referred to the undisputed testimony in the Lamar trial regarding the problems that alcohol abuse causes in our society, such as "coronary heart disease, gastrointestinal cancer, cirrhosis of the liver, traffic accidents, and occupational and family problems." 718 F.2d at 747; Lamar App. A at 34a; Dunagin App. at 43. In fact, the Lamar Petitioners, as well as all previous court decisions in these cases, have agreed that the State's interest is substantial.

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11/ Although without merit, the Dunagin Petitioners' argument, at page 12 of their Petition, that the State's interest is insubstantial has not been previously raised and is therefore improper.

Central Hudson itself supports the substantiality of the State's interest in suppressing demand for liquor created by advertising as part of its regulatory scheme for controlling the undisputed problems created by liquor consumption.

In Central Hudson, this Court agreed that "the state's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity" and, due to the importance of energy consumption, the state's interest was deemed substantial. Central Hudson Gas

& Electric Corp. v. Public Service

Commission of New York, 447 U.S. 557,

568, 100 S.Ct. 2343, 2352, 65 L.Ed. 2d

341, 352 (1980). Analogously, the

significant problems associated with

liquor consumption are sufficient to

support suppression of advertising designed to increase consumption of liquor.

Under the third element of the Central Hudson test, the Court held that Mississippi's liquor advertising laws directly advance the state's substantial interest in controlling such advertising. 918 F.2d at 747-751; Lamar App. A at 34a-49a; Dunagin App. at 43-60. The Fifth Circuit expressly followed the reasoning of this Court in Central Hudson and in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed. 2d 800 (1981), in reaching this conclusion. 718 F.2d at 749-95; Lamar App. A at 4a-47a; Dunagin App. at 54-58.

In Central Hudson, this Court judicially noticed "an immediate connection between advertising and demand for

electricity" and thus held that there was a "direct link between the state interest in conservation and the Commission's order," which banned promotional advertising by electric utilities. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 569, 100 S.Ct. 2343, 2353, 65 L.Ed. 2d 341, 353 (1980). Similarly, in Metromedia, this Court agreed with the "accumulated, common sense judgments of [the] local lawmakers" that "a legislative judgment that billboards are traffic hazards is not manifestly unreasonable" and that "[i]t is not speculative to recognize that billboards by their very nature ... can be perceived as aesthetic harm." 453 U.S. at 509, 510, 101 S.Ct. at 2893-2894, 69 L.Ed. 2d at 815, 816.

Thus, this Court held in Metromedia that San Diego's billboard ban directly advanced its substantial governmental interest of traffic safety and aesthetic appearance under the Central Hudson test. Drawing its analysis from these decisions,<sup>12/</sup> the Fifth Circuit in these cases properly held that "sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not 'concrete scientific evidence' exists to that effect." 718 F.2d at 750; Lamar App. A at 47a; Dunagin App. at 58.

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<sup>12/</sup> The Fifth Circuit also found persuasive the decisions of other courts that have considered the connection between advertising and consumption and found a direct link. See 718 F.2d at 747-748; Lamar App. A at 35a-37a; Dunagin App. at 44-46.

In so holding, the Fifth Circuit properly rejected the Lamar Petitioners' claim that the Respondents must provide "concrete scientific evidence" to substantiate the relationship between liquor advertising and consumption. As the Fifth Circuit recognized, this relationship between advertising and consumption is a "legislative" or "constitutional" fact issue which is bound up in the constitutional judgment that the appellate court must make independently of the district court's findings. 718 F.2d at 748, n.8; Lamar App. A at 40a; Dunagin App. at 50. See Ohralik v. Ohio State Bar Association, 436 U.S. 437, 463, 98 S.Ct. 1912, 1922, 56 L.Ed. 2d 454, 458 (1978); Fortin v. Darlington Little League, Inc., 514 F.2d 344, 348-349 (1st Cir. 1975); see also,

Drope v. Missouri, 420 U.S. 162, 175, n.10, 95 S.Ct. 896, 905, n.10, 43 L.Ed. 2d 103, 115, n.10 (1975). Scientific proof is not required to establish this legislative fact as this Court made clear in Central Hudson and, as taught in Metromedia, the judgment of the Mississippi Legislature that the ban on intrastate advertising decreases the stimulation of liquor sales and consumption is entitled to great weight.

For the same reason, the Fifth Circuit properly rejected the Lamar district court's conclusions that the state is "inundated" and "saturated" with out-of-state liquor advertisements and thus that the liquor advertising laws do not directly advance the State's interest. This conclusion was not a finding of fact entitled to "clearly

erroneous" review as the Lamar Petitioners apparently claim. See Lamar Petition at 12. The Fifth Circuit was required to reach its own conclusion regarding this legislative fact issue.<sup>12/</sup>

The Court cited several reasons in support of its conclusion. First, echoing the conclusion of this Court in Central Hudson, the Court of Appeals recognized that the Petitioners "would not be pursuing this case so vigorously if the market were truly saturated." 718 F.2d at 750; Lamar App. A at 48a;

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<sup>12/</sup> In fact, the Lamar district court's statement was included in the "Conclusions of Law" section of its opinion. Of course, the clearly erroneous rule does not apply to conclusions of law. E.g., 5A Moore, Federal Practice ¶ 52.03[2], at p. 2662 (1983).

Dunagin App. at 59. See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 569, 100 S.Ct. 2343, 2353, 65 L.Ed. 2d 341, 353 (1980) ("Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales.").

Secondly, the Lamar Petitioners' "evidence that liquor advertising appeared in national magazines in the Jackson [Mississippi] library, out-of-state radio and television broadcasts and out-of-state newspapers does not establish that advertising will not dramatically increase if the intrastate ban is invalidated." 718 F.2d at 750-751; Lamar App. A at 48a-49a; Dunagin App. at 59. In reality, the challenged laws

effectively restrict the primary source of liquor advertising for the Mississippi market - the in-state advertisers. Evidence in the Lamar record demonstrates that the Lamar Petitioners alone provide advertising coverage for the entire state. Lamar R. at 231-620. Thus, if the advertising laws were removed, liquor advertising would indeed "dramatically increase" in Mississippi.

Thirdly, the Court of Appeals concluded that "[i]f it were true that consumers were now being inundated with commercial information about liquor in contravention of the state's interest, the values behind the commercial speech doctrine would not be very much threatened," since the primary interest protected by the commercial speech doctrine are those of "the listener -

the consumer - in receiving information," not the interest of the speaker as in the ideological speech. 718 F.2d at 751-752; Lamar App. A at 49a, 59a; Dunagin App. at 67-68. See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 563, 100 S.Ct. 2343, 2350, 65 L.Ed. 2d 341, 349 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising.").<sup>13/</sup>

The Fifth Circuit completed its Central Hudson analysis by finding that the State's liquor advertising laws "are no broader than necessary to pursue its

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<sup>13/</sup> The Petitioners improperly rely on Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed. 2d 600 (1975), to support an argument that the First Amendment supports the newspaper Petitioners' alleged com-

goal of preventing the artificial stimulation and promotion of liquor sales and consumption." 718 F.2d at 751; Lamar App. A at 50a; Dunagin App. at 61. Contrary to the argument at page 14 of the Dunagin Petition, the Fifth Circuit reasoned that "a less restrictive time, place and manner restriction, such as a

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mercial advertising rights. Lamar Petition at 16; Dunagin Petition at 17. In Bigelow, this Court's primary First Amendment concern was directed at "national and interstate newspapers," id. at 828, 829, 95 S.Ct. at 2236, 44 L.Ed. 2d at 615, 616, advertising out-of-state abortion services, an "activity with which ... the state could not interfere." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 760, 96 S.Ct. 1817, 1825, 48 L.Ed. 2d 346, 357 (1976). In contrast to Bigelow, the instant cases concern restrictions on in-state media advertisers of liquor, over which the State has extensive power.

disclaimer warning of the dangers of alcohol," would not be effective. The Court correctly reasoned that the State's concern "is that advertising will unduly promote alcohol consumption despite known dangers" and "not that the public is unaware of the dangers of alcohol." 718 F.2d at 751; Lamar App. A at 51a-53a; Duragin App. at 62-64.

This analysis by the Fifth Circuit followed that of Metromedia in which this Court reasoned that "the most direct and perhaps the only effective approach to solving the problems [billboards] create is to prohibit them." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508, 101 S.Ct. 2882, 2893, 69 L.Ed. 2d 800, 815 (1981).

As just demonstrated, the Fifth

Circuit properly applied the contested elements of the Central Hudson test to the facts of these cases, although this examination is not a proper ground for certiorari review by this Court.<sup>14/</sup> Clearly, the Fifth Circuit's decision to uphold the constitutionality of the Mississippi liquor advertising laws under the Central Hudson standard does not merit this Court's review since the

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<sup>14/</sup> A discussion of the argument at pages 18 and 19 of the Dunagin Petition that the Mississippi liquor advertising laws were unconstitutionally applied to impede the advertisement of beer by the Dunagin Petitioners, which is without merit, is beyond the purpose of this Brief. This contention, even if valid, would not be a proper question for review by this Court since it is "episodic" and relates solely to the interests of the parties. See Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897, 901 (1955).

decision is not in conflict with this Court's decisions and does not present any substantial federal question.

II. Contrary to the Lamar Petitioners' Contention, the Fifth Circuit Did Not Deny Them Standing to Assert an Equal Protection Challenge and Followed the Decisions of this Court in Refusing to Adopt a Strict Scrutiny Standard of Review for Commercial Speech Under the Equal Protection Clause

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The Lamar Petitioners also argued that the Fifth Circuit has denied "standing [to] media businesses to challenge restrictions on commercial speech on equal protection grounds in conflict with the reasoning of opinions of this Court." Lamar Petition at 17, 21. Again, the Lamar Petitioners are refuted by the express language of the en banc decision. Citing and con-

sistent with Metromedia, which indicates that advertisers have standing to challenge advertising restrictions, the Court of Appeals clearly stated: "We do not mean to suggest that media advertisers lack standing to challenge commercial speech regulations." 718 F.2d at 752; Lamar App. A at 57a; Dunagin App. at 68. Thus, again these Petitioners present no viable question for review. Additionally, this question of standing would concern primarily the interests of the parties and would not constitute a proper issue for this Court's review.

The Lamar Petitioners are actually requesting this Court to create new constitutional law by adopting a strict scrutiny standard for commercial speech under the Equal Protection

Clause.<sup>15/</sup> In fact, the Lamar Petitioners ask this Court to apply the strict scrutiny analysis even when it is found that no First Amendment commercial speech rights have been violated. These contentions are contrary to this Court's prior equal protection decisions.

Furthermore, no commercial speech decisions of this Court have utilized the strict scrutiny standard under the Equal Protection Clause as confirmed by the Lamar Petitioners' improper reliance on decisions involving non-commercial, ideological speech to support this invalid argument. Lamar Petition, at 19, n.19. Petitioners' contentions certainly do not present a conflict or

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<sup>15/</sup> The Dunagin Petitioners have not raised an equal protection issue in their Petition to this Court.

substantial federal question which  
merits review.

The crux of the Lamar Petitioners' erroneous argument is that advertising is entitled to strict scrutiny review since, as commercial speech, advertising is a "fundamental right." Lamar Petition at 20. This argument is contrary to the consistent position of this Court that only ideological speech is a "fundamental right" under the First Amendment. For example, in Metromedia, this Court stated that commercial speech is entitled to only "a limited measure of protection, commensurate with its subordinate position in the scope of First Amendment values" and that "[t]he difference between commercial price and product advertising and ideological communication permits regulation of the

former that the First Amendment would not tolerate with respect to the latter."

Metromedia, Inc. v. City of San

Diego, 453 U.S. 490, 507, 101 S.Ct. 2882, 2892, 69 L.Ed. 2d 800, 815 (1981).

Accord, e.g., Bolger v. Youngs Drug Products Corp., \_\_\_\_ U.S. \_\_\_\_, 103 S.Ct. 2875, 2879, 77 L.Ed. 2d 469, 476 (1983).

(Due to the "commonsense distinction" between commercial speech and other forms of speech, "the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.") One reason for this "commonsense distinction," as explained by the Fifth Circuit, is that commercial speech advances only the economic interest of the speaker whereas ideological speech advances primarily its speaker's "exposition of ideas,"

which is at the heart of First Amendment protection. The primary interests protected by commercial speech "are those of the listener - the consumer - in receiving information." 718 F.2d at 752; Lamar App. A at 56a; Dunagin App. at 67-68. The Dunagin Petitioners admit this fact at page 6 of their Petition.

The Lamar Petitioners are also wrong to suggest that the challenged liquor advertising laws may be held constitutional under the First Amendment and still be entitled to strict scrutiny review under the Equal Protection Clause. If the First Amendment is not violated, there could not possibly be any "fundamental right" which would trigger strict scrutiny. In fact, since the challenged laws are constitutional under the First Amendment, they are

constitutional under the Equal Protection Clause because "they had already been found to represent the promotion of governmental values which override the individual interest in exercising their specific right." Nowak, Rotunda & Young, Handbook on Constitutional Law 676 (1978).

Additionally, the in-state advertisers and out-of-state advertisers are not "similarly situated groups" as the Lamar Petitioners also incorrectly argue. Lamar Petition at 18, n.18. The plain fact is that these groups are not similarly situated since liquor advertisements originating outside of Mississippi are beyond the State's control, both legally and as a practical matter, as the Fifth Circuit states:

We think it exceedingly unlikely that the state could block, jam, or otherwise ban all magazines, newspapers, cable signals and radio and television broadcasts originating from other states that contain liquor advertisements, as a practical manner, and in the face of the Commerce Clause, the Supremacy Clause and the First Amendment.

718 F.2d at 753; Lamar App. A at 59a-60a; Dunagin App. at 71-72. See Packer Corp. v. Utah, 285 U.S. 105, 110, 52 S.Ct. 273, 274-275, 76 L.Ed. 643, 647 (1932). Recognition of this common sense fact is the basis for the solely intrastate restrictions on liquor advertising in Mississippi.

Under the applicable rational basis standard of review, the Fifth Circuit properly found that Mississippi has a legitimate interest in controlling liquor advertising and that "the state could have rationally concluded that

local advertising was the promotion of intoxicating liquor that was susceptible to regulation." 718 F.2d at 753; Lamar App. A. at 61a; Dunagin App. at 73. Thus, the Lamar Petitioners present no questions concerning the Equal Protection Clause that merit this Court's review.

III. The Granting of Certiorari to Review Capital Cities Cable, Inc. v. Crisp, No. 82-1795, Does Not Support the Granting of Certiorari to Review the Instant Cases.

This Court recently granted certiorari to review a decision of the United States Court of Appeals for the Tenth Circuit that concerns the constitutionality of Oklahoma liquor advertising restrictions on cable television advertising, Capital Cities Cable, Inc. v. Crisp, No. 82-1795.

The granting of certiorari in

Capital Cities Cable should not affect this Court's decision to grant or deny certiorari in these cases.<sup>16/</sup> Capital Cities Cable is distinguishable from Lamar and Dunagin since it concerns restrictions on cable television under a regulatory scheme which bans in-state and out-of-state liquor advertisements. Furthermore, the review by this Court focuses on a conflict between Oklahoma's authority to ban wine advertisements on cable television and federal control of cable television advertising under federal statutes and Federal Communication Commission regulations. In fact, this Court specifically directed the parties in Capital Cities

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<sup>16/</sup> The decision that is being reviewed is Oklahoma Telecasters Association v. Crisp, 699 F.2d 490 (10th Cir. 1983).

Cable to brief and argue this federal-state regulatory conflict in its October 3, 1983 order granting a writ of certiorari:

[T]he parties are directed to brief and argue the following question: Whether the state's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting.

In contrast to Oklahoma, Mississippi's intrastate liquor advertising ban does not restrict liquor advertising on cable television or any other out-of-state media. As pointed out by the Fifth Circuit in its *en banc* decision: "The state has ... interpreted federal regulations to prohibit the state from interrupting or deleting wine commercials from cable television transmission sent from out-

side the state. See, 47 C.F.R. 76.55 (1982)." 718 F.2d at 741; Lamar App. A at 11a; Dunagin App. at 16. Thus, contrary to the statement at page 20 of the Dunagin Petition, the granting of a writ of certiorari in Capital Cities Cable does not support the granting of certiorari in these cases.

#### IV. Conclusion

As this Brief has demonstrated, the Lamar and Dunagin Petitioners present no conflicts with this Court's decisions and no important constitutional issues which merit review by this Court. Thus, particularly in light of this Court's "duty to avoid decisions on constitutional issues unless avoidance becomes evasion," 17/ this Court should deny the

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17/ Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 75 S.Ct. 614, 617, 99 L.Ed. 897, 901 (1955).

Petitions "for want of a substantial federal question," just as this Court similarly dismissed a liquor advertiser's challenge to a state ban on advertising of liquor price and price advantage by the drink in Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St. 2d 361, 433 N.E.2d 138, appeal dismissed, \_\_\_\_\_ U.S. \_\_\_\_\_, 103 S.Ct. 31, 74 L.Ed. 2d 45 (1982).

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Dated: April 9, 1984

CERTIFICATE OF SERVICE

I, JOHN E. MILNER, one of the  
counsel for Respondents herein, and a  
member of the Bar of the Supreme Court  
of the United States, hereby certify  
that on the 9th day of April, 1984, I  
served copies of the foregoing  
Respondents' Brief in Opposition on  
Petitioners by mailing three copies of  
said document by first class United  
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